

PROMOTING INNOVATION AND DEVELOPMENT BY RETHINKING THE ROLE OF COPYRIGHT LIMITATIONS AND EXCEPTIONS IN VIETNAM

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Abstract

It is widely accepted that copyright can drive innovation and development by providing incentives to creators and ensuring the public can gain access to knowledge. In promoting innovation and development, properly constructed copyright limitations and exceptions play an important role. They permit users to legitimately make use of existing works, and to reproduce, incorporate, or transform them to create new works. Moreover, they enlarge access to knowledge for ordinary people to enhance their capabilities of living with health, safety, education, enjoyment, and participation.

The thesis examines how Vietnamese copyright law should develop to promote innovation and development in the digital environment. It focuses on the important role of limitations and exceptions to copyright in encouraging access and reuse of copyright material. The aim of this research is to provide recommendations for policy development on limitations and exceptions to copyright in Vietnam.

This thesis argues that while Vietnam has a high demand for access to knowledge, its copyright law is overly restrictive. In order to address this imbalance, Vietnam should broaden its copyright limitations and exceptions. This is possible under both existing international obligations and in Vietnam's public interest. This research provides important recommendations for how the scope of copyright limitations and exceptions in Vietnam might be expanded by adopting fair use in order to embrace new opportunities provided by the digital economy. In addition, this thesis suggests that Vietnam should extend the scope of some important provisions that provide privileges for education, libraries and archives, and for people with disabilities.

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List of Abbreviations

ASEAN	Association of Southeast Asian Nations
ALRC	Australian Law Reform Committee
BTA	Bilateral Trade Agreement
CDs	Compact Discs
CLRC	Copyright Law Review Committee
COV	Copyright Office of Vietnam
CRPD	Convention of the Rights of Persons with Disabilities
Cth	Commonwealth (Australia)
DVD	Digital Video Discs
DVR	Digital Video Recorder
EC	European Commission
ECAP	European Capabilities Action Plan
ECAP III	The EU-ASEAN Project on the Protection of IPRs
EFF	Electronic Frontier Foundation
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GDP	Gross Domestic Product
ICTSD	International Central for Trade and Sustainable Development
IFLA	International Federation of Library Associations and Institutions
IMF	International Monetary Fund
IIPA	International Intellectual Property Alliance
IP	Intellectual Property
IPRs	Intellectual Property Rights
IT	Information Technology

ICT	Information Communication Technology
KEI	Knowledge Ecology International
LDCs	Least Developed Countries
MOET	Ministry of Education and Training
MOCST	Ministry of Culture, Sport and Tourism
NAFTA	North America Free Trade Agreement
OECD	Organisation for Economic Cooperation and Development
PCs	Personal Computers
PCDA	Proposal Related to WIPO Development Agenda
RAM	Random Access Memory
SCCR	Standing Committee on Copyright and Related Rights
TPMs	Technical Protection Measures
TPP	Trans-Pacific Partnership
TRIPS	Trade-Related Aspects of Intellectual Property Rights 1994
UCC	Universal Copyright Convention
UK	The United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Program
UNESCO	United Nations Educational, Scientific and Cultural Organisation
US	The United States of America
VCR	Video-Cassette Recorder
VCDs	Video-Cassette Discs
VCI	Venture Capitalist's Investment
VIETRRO	Vietnam Reproduction Rights Organisation
VN	Vietnam

WBU	World Blind Union
WCT	WIPO Copyright Treaty 1996
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty 1996
WTO	World Trade Organisation

Statement of Original Authorship

The work contained in this thesis has not been previously submitted to meet requirements for an award at this or any other higher education institution. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made.

QUT Verified Signature

Signature:

Date: January 2016

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Chapter 1: Introduction

1.1 STRUCTURE

This thesis focuses on the research question: how can Vietnam construct and appropriate a set of limitations and exceptions to copyright that will best promote innovation and development? This question centres on the ability of copyright users in developing countries to maximise their legitimate access to copyright works for innovation and human development. To begin with, the question is: why are innovation and development important? How can copyright limitations and exceptions promote innovation and development? This research concentrates on the important role of copyright limitations and exceptions in facilitating innovation and development. This hypothesis is then connected to the circumstance of Vietnam, in the context of the digital environment, in order to seek a pragmatic set of limitations and exceptions to copyright for stimulating innovation and development.

1.1.1 Innovation, development and Vietnamese copyright law

Vietnam is a developing country with a high demand of access to knowledge attained by cultural expressions for innovation and development. Being a low-income developing country, Vietnam has faced shortages of infrastructure, resources, insufficient education, lack of transparency, inappropriate business dealings, and inappropriately governmental development policies. This has resulted in low rates of innovation and low levels of human development in the country. This country requires significant access to textbooks and other types of expressions to improve the knowledge and skills of the population to boost the level of research and development efforts, to foster the adoption of technologies, marketing, and logistics strategies into local industries, and to increase local knowledge in health and food securities. Moreover, Vietnamese history and culture reveals that the country has a great love of learning and achievement of knowledge.¹ Reading culture is respected in this country. Furthermore, from the level of economic development, the country has experienced rapid growth following a program of economic reform 1986.² Local

¹ Vietnam is heavily influenced by Confucianism values and ideals, with a priority for education. See Chapter Five of this thesis, Section 5.1.

² The GDP of Vietnam has increased approximately 7% per year from 1986. See Chapter Two of this thesis.

knowledge has not been sufficient to meet the demands of this economic growth. It urgently requires the adoption of knowledge from industrial nations.

Of course, in a knowledge-based era, knowledge is not free of charge. It is universally protected by intellectual property rights (IPRs), such as copyright, patents, trademarks etc, with Vietnam no exception. It is bound by international obligations in protecting IPRs. Among IPRs, copyright protects original expressions that contain tremendous technological and social knowledge. This protection raises the cost of observing existing knowledge through licensing administration schemes and royalties. The stricter the copyright protection, the more expensive cultural products, and the less opportunities for knowledge obtained by citizens. Therefore, there is a hope that Vietnamese copyright law can be made less restrictive in order to provide greater access to knowledge for the public.

Unfortunately, the current copyright law in Vietnam is too restrictive to address emerging issues relating to the access of knowledge for the demand of innovation and development. Overly strong copyright protection was introduced and has failed to provide an appropriate set of limitations and exceptions. As a result, legitimate access to knowledge is too expensive for Vietnam to gain the high demand of access necessary to carry out reforms in education and public health, and to set up democracy in the society. In the education sector, access to textbooks and research materials for educational purposes is extremely restricted. Expensive books and research data resources, due to overly strict copyright protection, have discouraged libraries, schools, and universities from buying or importing from overseas.³ Students or scholars are consuming poor, outdated knowledge translated from scholars studying abroad or from free websites. Similarly, advanced knowledge for medical treatment or new medicines has not been updated. As a result, the country has been living in poverty of nutrition.⁴ Additionally, the public have limited knowledge of

³ Ngan Anh, 'Why have Vietnamese universities not wanted to import textbooks from overseas?' The VietnamNet (online) 21 December 2014 <<http://vietnamnet.vn/vn/giao-duc/212162/tai-sao-truong-dai-hoc-khong-hao-hung-nhap-khau-giao-trinh-.html>> (translated from Vietnamese language). In this article, the author conducted a number of interviews with chancellors of Vietnam universities and well-known professors and found that one reason for this fact was universities' tight budgets in comparison to expensive book prices.

⁴ World Bank, 'Vietnam: Nutrition at a Glance' (2008) <<http://siteresources.worldbank.org/NUTRITION/Resources/281846-1271963823772/Vietnam.pdf>> (retrieved 8 January 2015). This paper reported that over one-third of child deaths are due to malnutrition, mostly from increased severity of disease. This happened not only in poor families but

human rights and democracy, making it difficult for them to improve their liberty, choices, and participation.⁵

Of course, people find their own way to access knowledge; that is, through piracy. Piracy is rampant in Vietnam.⁶ It is difficult for Vietnamese people to obtain legal access to copyright works, especially in the education sector, because of its restrictive copyright law. It is more difficult in the education sector than in any other sector to obtain legal access to information through licensing schemes, because almost all educational institutions are state-owned. These institutions are operating on tight government budgets.⁷ While educational institutions are struggling with teachers' wages and improving their infrastructure, they are unable to afford expensive books and other educational materials via voluntary licences. According to the World Bank, the budget allocated for educational institutions has been primarily spent on improving schools' infrastructure, school attendance rates, and expanding the number of universities and colleges, rather than focusing on the quality of education.⁸ As a result, photocopy shops are popular in every part of Vietnam, from which a large volume of copyright works are illegally reproduced and distributed. Students and teachers opt to pay for illegal copies made by photocopying businesses rather than buying a legal version at the expensive price. DVD or CD shops often sell illegal copies of CDs and DVDs. IIPA indicated in its 2014 report that Vietnamese

also rich families. This is not an issue of food access, but of health practice and disease. The lack of diffusion of nutrition related-knowledge is a main cause of this problem.

⁵ Although Vietnam has a nation-wide public library system that provides people with access to knowledge and information, public access to knowledge is limited due to the small, outdated collection of books and journals available. See more at Kim N B Ninh, 'The Challenge: Increasing Access to Information and Internet in Vietnam' *Weekly Insight and Analysis in Asia of The Asia Foundation* (19 August 2009) <<http://asiafoundation.org/in-asia/2009/08/19/the-challenge-increasing-access-to-information-and-internet-in-vietnam/>> (retrieved 8 January 2015).

⁶ See International Intellectual Property Alliance (IIPA), 2014 Special 301 Report <<http://www.ustr.gov/sites/default/files/USTR%202014%20Special%20301%20Report%20to%20Congress%20FINAL.pdf>> (retrieved 06 January 2015). Also reported by IIPA from 2001 to 2013, see <www.iipa.com>.

⁷ Although Vietnam is one of the top spenders on education in the world, funding for education is still modest. Within the 12 years from 1998 to 2010, the country increased the total budget for education from 13% to 20%. The state budget for education has been reduced down to 10% from 2013. See more at World Bank, 'Skilling up Vietnam: Preparing the workforce for a modern market economy_ Vietnam Development Report 2014' (November 2013) < www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/11/26/000461832_20131126115640/Rendered/PDF/829400AR0P13040Box0379879B00PUBLIC0.pdf world bank vietnam rankings ASEAN labour force development> (retrieved 07 September 2015).

⁸ World Bank, 'High quality education for all should be Vietnam's priority' (25 April 2012) <<http://www.worldbank.org/en/news/feature/2012/04/25/high-quality-education-for-all-should-be-vietnam-priority>> (retrieved 10 September 2015).

people are consuming illegal counterfeits from China, as well as home-made pirated optical discs, and ‘media box’⁹ piracy.¹⁰

However, this piracy has created negative corollaries for Vietnamese society. It has created the conditions for profitable illegal photocopy businesses to sell unauthorised copies of trade books, travel books and academic textbooks. This unlicensed printing severely harms publishers. For example, 90% of English language books are unauthorised reprints and adaptations.¹¹ This obviously harms foreign publishers. Also, it negatively impacts knowledge transfers into Vietnam. Piracy has made FDI into Vietnam less attractive, which has the potential to slow the rate of knowledge transfer. The anxiety of foreign investors on their intellectual property is visible; they are afraid to invest into cutting-edge innovations in Vietnam, but are still prepared to exploit Vietnam as a manufacturer of cheap products. Therefore, piracy hinders both innovation and human progress in Vietnam. Authorities find it difficult to prevent it. A proper approach to constructing Vietnamese copyright law to adapt to the needs and possibilities of this nation is required.

1.1.2 Innovation and development are important for human beings

Innovation and development are important to human beings. Innovation is ‘the doing of new things or the doing of things that are already being done in a new way’.¹² Innovation is universally recognised as the most important component of economic development.¹³ It is the ‘endogenous dynamic of development’ or ‘the

⁹ ‘Media box’ (set-top device) is a fast-growing phenomenon by which people purchase pirated materials directly from foreign websites or use a hard disk to store pre-loaded or subsequently downloaded content.

¹⁰ IIPA, ‘Vietnam_2014 Special 301 Report on Copyright Protection and Enforcement’ available at <<http://www.iipa.com/rbc/2014/2014SPEC301VIETNAM.PDF>>.

¹¹ Ibid, at p80.

¹² Joseph A Schumpeter, ‘The Creative Response in Economic History’ (1947) *The Journal of Economic History* 149, 151.

¹³ Kiichio Yagi, ‘Schumpeter in the Harvard Yard: inventions, innovations and growth’ In Yuichi Shionoya and Tomotsu Nishizawa (eds), *Marshall and Schumpeter on Evolution: Economic Sociology of Capitalist Development* (Edward Elgar, 2008) 204; Alain Alcouffe and Thomas Kuhn, ‘Schumpeterian endogenous growth theory and evolutionary economics’ (2004) 14 *Journal of Evolutionary Economics* 223, 226; J Bradford Delong, ‘Creative Destruction’s Reconstruction: Joseph Schumpeter Revisited’ (2007) 54 (15) *The Chronicle of Higher Education* B8-9; Renee Prendergast, ‘Schumpeter, Hegel and the vision of development’ (2006) 30 *Cambridge Journal of Economics* 253, 257; Sisule F Musungu, ‘Rethinking innovation, development and Intellectual Property in the UN: WIPO and Beyond’ (TRIPS Issue Papers No 5, WTO, 2005) 4-6; Nathan Rosenberg, ‘Innovation and Economic Growth’ (2004) OECD <<http://www.oecd.org/cfe/tourism/34267902.pdf>>;

driving force of economic development'.¹⁴ Innovation stems from technological discoveries and is adopted and diffused by entrepreneurs into the market. The successful commercialisation of innovation creates added value for the economy or pushes the economy up; thus, contributes to economic growth.¹⁵

Development is whatever provides a good change¹⁶ in a variety of aspects of human society. It is the improvement of people's lifestyles and enlargement of the range of people's choices, such as expanding freedom, democracy, and participation. Human development is no longer identified with, achieved through, or measured only by gross domestic product (GDP) per capita or economic growth; it needs to give humans the opportunity to live long and healthy lives, be educated, and promote freedom, choices, and capabilities.¹⁷ Amartya Sen, a Nobel prize-winning economist, built up a new theoretical paradigm in development called 'human development', or 'capability approach', that requires advancing capabilities that aim to promote freedom and choices, so that people have the opportunity to experience a higher quality of life.¹⁸ Martha Nussbaum then developed this theory and emphasised 10 central capabilities of people's quality of life: life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; other species; play; and control over one's environment.¹⁹ Nations need to ensure that everyone's central capabilities are protected up to a minimum threshold;²⁰ that is to say, a good and flourishing life requires not only living longer, but also living happier lives with a high quality of health, senses, and emotions.

1.1.3 Innovation, development, and access to knowledge

Innovation and development are connected to knowledge growth. Knowledge growth begets innovation, and innovation, in turn, generates added value for the economy or economic growth. Romney stated that knowledge, found mostly in humans, arises from human invention, and is learned and handed down from one

¹⁴ Schumpeter, above note 12

¹⁵ Schumpeter, above note 12

¹⁶ R Chambers, 'Ideas for Development' (IDS Working Paper No 238, IDS, 2004) 1.

¹⁷ UNDP, 'Concept and Measure of Human Development' The Human Development Report 1990 <<http://hdr.undp.org/en/reports/global/hdr1990/>> (retrieved 13 July 2012); Amartya Sen, *Development as Freedom* (Oxford University Press, 1999) 35.

¹⁸ Amartya Sen, above note 17.

¹⁹ Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press, 2011) 33-34.

²⁰ Nussbaum, above note 19 at 109.

generation to the next.²¹ Dopfer and Potts posited that the evolution of human beings [development] is traced by the growth of knowledge.²² When an innovation appears, it means to some extent that there is growth in people's knowledge, because 'all economies are knowledge based and could not be otherwise...economics can grow because knowledge can grow'.²³ Economic growth begins with a novel idea [invention] in a single agent and then is adopted and retained by other agents [imitation] so as to form a stable rule. This stable rule is in turn improved by new rules to progress the existing rules.

Access to knowledge is critical for innovation, as innovation is, in essence, a cumulative process that builds on past knowledge and innovation. Nothing comes from zero. The existing innovation provides the basis and inspiration, or stimulation, for further ones.²⁴ For example, the first generation of Apple's iPhone provided the foundation for iPhones 2, 3, 4, 5 and 6 to develop their functions and capabilities. Additionally, as soon as it was distributed on the market, this innovation led to the development of numerous other smart phone-related innovations. This innovation is the inspiration of not only Apple's products but also its competitors, such as Samsung, HTC, and Google; that is to say, the wide and rapid spread of knowledge has an impact on innovation or economic growth. If businesses are slow to gain access to new technologies, ideas, and information, this limits their productive potential.

In addition, access to knowledge is more important for innovation in the digital age where innovation is decentralised. The advent of the internet and the rapid development of digital technologies have shifted views on innovation. In the traditional consumer culture, users consume corporate products without shaping and controlling cultural production and their preconditions.²⁵ In contrast, a series of recent changes in digital technologies (digital cameras, laptops, audio-visual recordings), plus the global reach of the internet has created new opportunities for

²¹ A K Romney, 'Culture Consensuses as a Statistical Model' (1999) 40 *Current Anthropology* 103, 104.

²² Kurt Dopfer and Jason Potts, *The general theory of economic evolution* (Routledge, 2008) 6.

²³ J S Metcalfe, 'The Entrepreneur and the Style of Modern Economics' (2004) 14 (2) *Journal of Evolutionary Economics* 157, 176.

²⁴ Michael A Gollin, *Driving Innovation: Intellectual Property Strategies for a Dynamic World* (Cambridge University Press, 2008) 165; Tyler Cowen, 'Public goods and Externalities' <<http://www.econlib.org/library/Enc1/PublicGoodsandExternalities.html>> (retrieved 13 March 2015).

²⁵ Yochai Benkler, *The Wealth of Networks* (Yale University Press, 2006) 2.

individuals to engage in creative activities. Today, anyone can be an innovator. As stated by the Digital Connections Council of the Committee for Economic Development, ‘Digitisation plus the internet enable the world at large to have access to more information than the greatest libraries in history ever possessed, and allows anyone to be a creator and a publisher’.²⁶ Nowadays, consumers actively consume finished products by modifying, remixing, and manipulating pre-existing innovation to suit their own needs. In doing so, they are creating a massive number of innovations. The huge population of user innovators acquires access to knowledge for their innovations; that is to say, the decentralisation of innovation requires the large diffusion of knowledge in the community, so that knowledge and information can spill over to the population.

Human development also requires access to knowledge, because access to knowledge helps people to enhance their capabilities. Knowledge can make people healthier, as shown when new scientific data drives a doctor to recommend a different treatment, or when new and more effective medicines are introduced. It can provide new opportunities, as shown when advanced scientific knowledge helps a small businessperson or farmer learn new technologies to improve the quality of their goods, and assists them to sell their products at a fairer price. Knowledge accumulated in textbooks or on websites helps a student acquire new and useful skills. Cultural knowledge, such as music, novels, and movies, are part of a shared culture that connects us as a society and adds meaning to our lives. Diffusion of new ideas, concepts, or cultural expressions from one to another, from this generation to the next, has an important impact not only for economic growth, but also for improving the quality of life, education, health, and cultural heritage of human beings.

In summary, access to knowledge is the central issue for promoting innovation and development. Therefore, the rest of this thesis sets out appropriate limitations and exceptions to copyright in order to obtain more access to knowledge for innovation and development without sacrificing the incentive of creativity.

²⁶ The Digital Connections Council of the Committee for Economic Development, *Promoting Innovation and Economic Growth: the Special Problem of Digital Intellectual Property* (2004) 4 <http://msl1.mit.edu/furdlog/docs/2004-03-01_ced_report_digital_ip.pdf> (retrieved 12 September 2012).

1.1.4 Copyright protection and access to knowledge

Access to knowledge has a close connection to access to original expression, as knowledge is often expressed in a material form, such as books, articles, posters, diagrams, figures, or digital forms. Therefore, gaining access to knowledge often requires people to have access to its expression.

Copyright protection controls the access of knowledge expression; thus, it has a significant impact on creation, innovation, and human development. Copyright is an external force²⁷ that encourages authors to create new works or new knowledge. Knowledge is a public good that is typically non-rivalrous and non-excludable.²⁸ In order to generate novel knowledge (a new work), the author has to spend time and labour. However, as such knowledge is distributed, it is difficult to stop others from using it. More seriously, if an idea is distributed, the expenditure of delivery is zero, therefore the dissemination of such an idea will be free of charge.²⁹ As a result, the creator is afraid of sharing his/her new idea, because it might be shared with others for free. Therefore, an external force is required to stimulate the creator to generate and distribute new works that contain new ideas.³⁰ Copyright grants creators a bundle of exclusive rights in order to control the use of their works and obtain recompense on their investment. In doing so, it encourages people to grow knowledge. That is why Teece concluded that the degree of knowledge growth ‘depends firstly on the legal protection of copyright’.³¹

However, copyright protection is a tremendous influence on the diffusion of knowledge or access to knowledge. Mere protection of creators might also block the flow of knowledge into the community, because the law privatises knowledge expressions as the exclusive property of a particular individual or corporation. It gives a single owner the right to prevent anyone else from having access to use or benefit by enabling the owner to charge others for access to knowledge expression,

²⁷ Kamil Idris, *Intellectual Property: a power tool for economic growth* (WIPO, 2003) 8; Joseph E Stiglitz, ‘Economic Foundations of IP rights’ (2007-2008) 57 *Duke Law Journal* 1693, 1694; Tyler Cowen, *Public Goods and Market Failures: A Critical Examination* (Transaction Publishers, 1999) 1-3.

²⁸ Paul A Samuelson, ‘The pure theory of public expenditure’ (1954) 36 *Review Economics and Statistics* 387, 387; Tyler Cowen, above note 27, 11.

²⁹ See Paul A Samuelson, ‘The pure theory of public expenditure’ (1954) 36 *Review Economics and Statistics* 387, 387; Joseph E Stiglitz, above note 27 at 1699-70; Rod Falvey, Neil Foster and David Greenaway, ‘IPRs and Economic Growth’ (2006) 10 (4) *Review of Development Economics* 700, 701; Tyler Cowen, above note 27 at 13.

³⁰ Kamil Idris, above note 27; Joseph E Stiglitz, above note 27

³¹ David J Teece, ‘Reflection on Profiting from Innovation’ (2006) 35 *Research Policy* 1131, 1134.

often at an expensive price, in order to exclude potential competition.³² The fact remains that a nation has public concerns, such as food, security, education, and public enjoyment, that are equally or even more important than private benefit.³³ The shortage of sharing cultural works in those fields may hinder development. It impedes people's capability to experience freedom, choices, and participation.

Therefore, copyright law needs to find the balance between protection of copyright holders and public demand. How can it exercise this role? The law balances between conflicting interests through two groups of provisions: the group of copyright protection, such as the term of protection or the bundle of exclusive rights, and the other group, so-called limitations and exceptions to copyright. The former group has a duty to bring a fair return to copyright owners. The latter group tries to secure the widespread dissemination/diffusion of knowledge to the public or particular users for public purposes.

1.1.5 The role of copyright limitations and exceptions in promoting innovation and development

An essential part of the balance between public and private interests in copyright limitations and exceptions to copyright is to foster both innovation and development, as this can make room for potential creators to access knowledge. They provide the 'start-up capital' for future innovators and allow for the development of the creative potential of new technologies. Pamela Samuelson stated that limitations and exceptions to copyright 'help to ensure that a second author can build on pre-existing works, so as to promote the progress of science'.³⁴ For the purpose of economic growth, they encourage investment and create new markets for technology companies. Moreover, they repair market failures that help economic activities work more efficiently. For human improvement, they encourage the freedom of expression and the efficiency of knowledge flow vital for a social democracy. In addition, copyright limitations and exceptions help to preserve cultural heritage and promote cultural diversity. Furthermore, they support education. The role of copyright

³² Lea B Shaver, *Access to Knowledge in India* (Bloomsbury Academic, 2011) 2.

³³ As said above by Sen and Nussbaum, the quality of life in a nation improves not only when the economy grows, but also requires improvement in the living standard of inhabitants by securing to all citizens at least 10 central capabilities. Therefore, each country must focus on not only protecting knowledge, but also facilitating the dissemination of knowledge.

³⁴ Pamela Samuelson, 'The copyright principle project: Directions for reform' (2010) 25 *Berkeley Technology Law Journal* 1175, 1228.

limitations and exceptions in facilitating innovation and development is evaluated in this thesis.

In the digital age, where access to knowledge is overwhelmingly important, limitations and exceptions to copyright become a matter of national development policy, because they provide opportunities for particular users in specific circumstances to access knowledge. Decentralisation of innovation requires open access to knowledge so that everyone can access knowledge for the purpose of creating new innovation.³⁵ Moreover, a good and flourishing life requires access to knowledge in order to promote freedom and choices, so that people can have the capability to experience a higher quality of life. This creates a requirement for every copyright system to broaden the scope of copyright limitations and exceptions, rather than increasing the level of copyright protection.

1.1.6 The attention of the global community on copyright limitations and exceptions

Global copyright law has offered stronger protection for copyright owners and paid little attention to the limitations and exceptions to copyright. Since its modern inception in the 18th century, the international copyright regime has increased the level of protection for copyright holders, giving the copyright holders longer protections, more exclusive rights, and stronger enforcement mechanisms. Born through the *Statute of Anne 1710* in England, copyright law grants the author the right to control the printing and publishing of their own writing. The term of protection was only 14 years.³⁶ Nowadays, the law grants the author a bundle of exclusive rights, including reproduction, distribution, communication, exhibition, and performance rights. The term of protection has increased to up to 50 years, plus the author's life, and even 70 years plus the author's life.³⁷ The remedies for

³⁵ William W Fisher, 'The Implications for Law of User Innovation' (2010) 94 *Minnesota Law Review* 1417, 1441-1446.

³⁶ Carla Hesse, 'The rise of intellectual property, 700B.C.-A.D.2000: an idea in the balance' (2002) 131 (2) *Daedalus* 38

³⁷ The *Berne Convention* and *TRIPS Agreement* require the term of protection to be 50 years plus the author's life. For example, FTAs between the US and other countries require the term of protection to be 70 years plus the author's life.

copyright infringement have grown from civil liability to civil, administrative, and even criminal liabilities.³⁸

Conversely, limitations and exceptions to copyright have received little attention from the global community.³⁹ They were not covered in the first copyright law – the *Statute of Anne 1710*.⁴⁰ Limitations and exceptions were firstly set forth in the *Berne Convention 1886*, and then adopted in a number of copyright-related conventions, such as the *Rome Convention*, *Universal Copyright Convention*, *Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPS) Agreement*, and World Intellectual Property Organisation (WIPO) treaties through a general rule: the three-step test. This thesis examines the functions of the three-step test, and interprets the test in the *Berne Convention* and beyond. It shows that the three-step test is abstract; thus, the interpretation of the test is critically flexible and provides signatories with great freedom to write limitations and exceptions into their domestic laws.

Based on the general three-step test, each country introduced their own limitations and exceptions test, considering their own social, cultural, political, and economic needs. Therefore, each country has a different set of limitations and exceptions. However, almost all countries, regardless of different levels of development, are adopting either the fair dealing approach of the EU or the fair use approach of the US. This raises the question among academia as to whether one size fits all.⁴¹ This thesis looks at the two approaches to providing limitations and exceptions: fair dealing and fair use. This thesis argues that fair use is flexible, adaptable, and sufficiently predictable; whereas fair dealing is too rigid to adapt to social and technological changes, and is not more certain than fair use. Hence, fair use is the best model to use in the digital age.

³⁸ Simon A Fitzpatrick, 'Prospects of Further Copyright Harmonisation?' (2003) 5 *European Intellectual Property Review* 215, 216; Julian Rodriguez Pardo, *Copyright and Multimedia* (Kluwer Law International, 2003) 53; Carla Hesse, above note 36 at 38.

³⁹ Sam Ricketson, 'WIPO study on limitations and exceptions of copyright and related rights in the digital environment' (2003) *WIPO SCCR/9/7*, 3.

⁴⁰ Even given the fact that the *Statute of Anne 1710* required the author to deposit copies to seven important libraries, there was no provision on limitations and exceptions to copyright. It was only established and developed after 1841 from the term 'fair abridgment' in the case *Folsom v. Marsh*. See more at 'The history of limitations and exceptions to copyright' in Chapter 2 of this thesis. Also see Patricia Aufderheide and Peter Jaszi, *Reclaiming Fair Use: How to put balance back in copyright* (The University of Chicago Press, 2011) 26; Sam Ricketson, above note 34 at 3.

⁴¹ Lauren Loew, 'Creative Industries in Developing Countries and IP Protection' (2006) 9(1) *Vanderbilt Journal of Entertainment and Technological Law* 171, 185; Madhavi Sunder, 'IP3' (2006) 59 (2) *Stanford Law Review* 257, 260; Keith Maskus, 'IPRs and Economic Development' (2000) 32 *Case Western Journal of International Law* 471, 473.

1.1.7 Copyright limitations and exceptions in developing countries

Copyright limitations and exceptions are an important issue to developing countries, where people live in poverty of nutrition, education, and health security. These issues happen simply due to a shortage of knowledge.⁴² Advanced knowledge is generated and accumulated in developed countries.⁴³ Knowledge and technical transfers from developed countries are needed for developing countries to bridge the gap between the developed and developing worlds. The development of such countries depends on their knowledge acquisition capacity. Therefore, access to knowledge has undoubtedly remained a privilege of citizens in developed countries.

Unfortunately, knowledge transfer from the developed world to the developing world has been hindered due to the expensive cost of knowledge goods. Globally, strong copyright protection creates universal barriers to legitimate approaches to knowledge goods as it is time-consuming and it costs money to negotiate and obtain a licence.

While a change in international copyright protection is not feasible, enlarging the proper scope of limitations and exceptions should be a good idea for developing countries to achieve more access to knowledge in the age of international harmonisation. Chile, for example, has extended the scope of limitations and exceptions to copyright in order to take advantage of broad access to human knowledge for innovation and development.⁴⁴

1.1.8 Copyright limitations and exceptions in Vietnam

Vietnam fails to provide an appropriate set of copyright limitations and exceptions. In forming limitations and exceptions, Vietnam repeats the three-step test verbatim to the bottom of Article 25, 26 of *the Law on IP 2005* (revised in 2009), which contain the closed list of limitations and exceptions in its copyright law. It

⁴² World Bank, *World Development Report 1999/2000: Entering the 21st Century* (1999) World Bank <<https://openknowledge.worldbank.org/handle/10986/5982>> (retrieved 30 December 2014).

⁴³ Robert M Sherwood, 'The TRIPS Agreement: benefits and costs for developing countries' (2000) 19 (1/2) *Int. J. Technology Management* 57, 59; Richard Watt, 'An empirical analysis of the economics of copyright: How valid are the results of studies in developed countries for developing countries?' (2007) *The Economics of IP* 65, 67 available at <http://www.wipo.int/export/sites/www/ip-development/en/economics/pdf/wo_1012_e_ch_3.pdf> (retrieved 30 December 2014).

⁴⁴ Chile enacted the new *Copyright Act 2010* that enlarged the scope of copyright limitations and exceptions. It has been noted that this is a new movement in this country towards stimulating innovation and development. See International Consumers, *Access to Knowledge _ Chile* <<http://a2knetwork.org/reports/chile>> (retrieved 13 November 2014).

creates an extra layer of restriction for limitations and exceptions. Moreover, the closed list of limitations and exceptions indicates that Vietnam has chosen the fair dealing approach; therefore, the limitations and exceptions of Vietnam are inflexible and unadaptable to rapid changes. Furthermore, the current closed list of limitations and exceptions cannot address the access demands of the country when it does not cover important limitations and exceptions, as well as simply lacking vital provisions to support access for users. As said above in Section 1.1.1, Vietnam is struggling to access innovation and human development due to inappropriate copyright law. Improper copyright limitations and exceptions significantly contribute to this problem. Hence, it is necessary for Vietnam to design pragmatic limitations and exceptions to copyright in order to provide more access to knowledge for the public and special users. In doing so, the poverty of knowledge will be resolved, and this might contribute to the prevention of piracy sustainably.

The conclusion of this thesis suggests that a proper set of limitations and exceptions to copyright in Vietnam should be established. The law should adopt fair use to ensure the flexibility of limitations and exceptions. Doing so will embrace limitations and exceptions for private uses (time-shifting or format-shifting), parody or satire, and reverse engineering of computer software, which are over-looked in the fair dealing approach. Furthermore, the scope of limitations and exceptions will be expanded by the courts. Vietnam is not alone in the shift to fair use. Many countries are working on this and some have been successful, such as Singapore and Korea. Movements towards fair use are foreseeable in developed countries such as Canada, the UK, and Australia, and in developing countries such as Brazil and Thailand. In considering the specific conditions of Vietnam, it is expected that fair use will work well. While Vietnam has civil law system, it has developed to recognise the doctrine of precedent. Additionally, Vietnam has paid a lot of attention to training judges in IP knowledge and international trade. These are good indications for a bright future. In addition, Vietnam should extend the scope of specific exceptions for libraries or archives, educational use, and the use of persons with disabilities, so that users have more access pathways to obtain knowledge for their creative activities, as well as enjoyment. Again, Vietnam is not alone, as many other countries around the world have extended the scope of such specific limitations and exceptions. The US, Australia, and Chile have significantly extended special copyright limitations and

exceptions to best serve innovation and development. Last but not least, Vietnam should be more active in the evolving developing countries' groups of WIPO or the World Trade Organisation (WTO) to push the international community to solve access problems in developing countries. At the moment, Vietnam should follow Chile in Trans-Pacific Partnership (TPP) negotiations to protest TPP clauses that shrink the scope of copyright limitations and exceptions.

1.2 AIMS AND OBJECTIVES

This thesis aims to identify how copyright law in Vietnam can be improved to promote innovation and enhance human development. It argues that copyright law in Vietnam is currently overly restrictive and does not provide sufficient flexibility to meet the needs of the Vietnamese people to gain adequate access to knowledge. The ultimate aim of the thesis is to develop an enhanced set of copyright limitations and exceptions that strike a more appropriate balance between user rights and private incentives in the digital age. I argue that doing so is likely to provide much needed enhancements to access to knowledge in Vietnam.

In order to investigate how Vietnamese copyright law can adopt balanced and appropriate copyright limitations and exceptions that are suited to the digital age, this research seeks to answer three primary questions:

- (1) What is the role of copyright limitations and exceptions in promoting innovation?
- (2) What is the role of copyright limitations and exceptions in promoting development?
- (3) How can limitations and exceptions to copyright be constructed to better serve innovation and development in Vietnam?

Based on the above research questions, this thesis examines the fundamental reasons for the existence of copyright limitations and exceptions in copyright law. By doing so, it seeks to clarify the role of copyright limitations and exceptions in promoting innovation and development. It then critically analyses the requirements of copyright limitations and exceptions in international law (the three-step test) to identify the extent to which Vietnam is free to make amendments to its domestic law. In making recommendations to introduce more flexible and better targeted copyright

limitations and exceptions, this thesis highlights why reform is required and how the law can be amended without violating international agreements or unduly prejudicing the legitimate interests of copyright owners. In doing so, the thesis examines the current operation of copyright limitations and exceptions in Vietnam, including: How does it implement the three-step test? Are its limitations and exceptions enough to accommodate social practice? What are the shortcomings of limitations and exceptions? What are the solutions for Vietnam in the digital age? The experiences of other countries, such as the US, Australia, Canada, the UK, Singapore, South Korea, Brazil, and Chile are examined as comparisons that can assist reform in Vietnam.

1.3 THEORETICAL APPROACH

This research takes a critical approach to copyright law and literature on innovation and development in order to expose the deterministic trends that underpin much of scholarship. This research draws heavily on the work of Joseph A Schumpeter in taking an evolutionary approach to innovation and economic development.⁴⁵ Evolutionary theory of economic change emphasises the important role of innovation as the endogenous dynamic of economic development. This thesis acknowledges that in order to push up the economy, a nation needs to invest in innovation. Following this, this work builds upon the work of those who have changed the thoughts about the generation of innovation, particularly William Fisher,⁴⁶ Henry Jenkins,⁴⁷ Yochai Benkler,⁴⁸ and Stephen Flowers and Flis Henwood⁴⁹. The key element explored by these scholars is that innovation in the digital age is decentralised, other than that centred inside firms or enterprises. Innovation decentralisation requires an efficient flow of knowledge and cultures rather than privatisation of knowledge.

This project also relies on the capabilities approach established and developed by Amartya Sen⁵⁰, Martha Nussbaum,⁵¹ and Madhavi Sunder⁵² on human

⁴⁵ Above note 7.

⁴⁶ William W Fisher, above note 35.

⁴⁷ Henry Jenkins et al, *Confronting the Challenges of Participatory Culture: Media Education for the 21st Century* (MIT Press, 2009).

⁴⁸ Yochai Benkler, above note 25.

⁴⁹ Stephen Flowers and Flis Henwood, *Perspective on User Innovation* (Imperial College Press, 2010).

⁵⁰ Above note 17.

⁵¹ Above note 19.

development. The capability approach fixed the distorted picture drawn for a long time that development was determined by economic growth. In fact, quality of life in a nation improves not only when the economy grows, but it also requires the improved living standards of inhabitants by securing to all citizens at least 10 central capabilities.

After exposing the tensions in the theory of innovation and development, this thesis adopts an approach developed by Ruth L Okediji,⁵³ Lauren Loew⁵⁴ and Andreanne Leger⁵⁵ that discuss copyright law for developing countries. This thesis absorbs the idea that current overly-strong copyright protection is not useful for a developing country, as it blocks the flow of knowledge and culture transfer from the developed to the developing world. This results in the poverty of knowledge and culture in developing countries, including Vietnam. These scholars then suggest a broad scope of limitations and exceptions for innovation and development in developing countries.

After exploring theoretical approaches in copyright law, innovation and development, this project works on the specific circumstance of Vietnam. This country contains its own aspects of culture, politics, history, and economic levels of development that require an open zone for access to knowledge and culture.

This research makes an important contribution by stating that in promoting innovation and development in Vietnam, policymakers ought to broaden or extend the scope of limitations and exceptions to copyright to create open zones for access to knowledge and culture. Adopting the fair use doctrine and expanding the scope of important copyright limitations and exceptions that favour public access, including limitations and exceptions for educational use, libraries or archives, and for the use of people with disabilities, is the best option for the country to foster innovation and development.

⁵² Madhavi Sunder, *From Goods to a Good Life* (Yale University Press, 2012).

⁵³ Ruth L Okediji, 'The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries' UNTACD – ICTSD Project on IPRs and Sustainable Development (2006) 2 <http://www.unctad.org/en/docs/iteipc200610_en.pdf> (retrieved 02 December 2014); Ruth L Okediji, 'The International Relations of IP: Narratives of Developing Country Participation in the Global IP System' (2003) 7 *SING. J. INT'L and COMP. L* 315.

⁵⁴ Lauren Loew, above note 41.

⁵⁵ Andreanne Leger, 'The Roles of IPRs for Innovation: A Review of the Empirical Evidence and Implications for Developing Countries' working paper <<http://www.diw.de/deutsch/produkte/publikationen/discussionspapiere/aktuell/index.jsp>> (retrieved 2 December 2014).

1.4 METHODOLOGY

The primary methodology employed in this thesis is theoretical examination. This methodology is used to examine the literature on the relationship between copyright, innovation, and development. Much of this literature emerges from developed countries, mostly from the US, some from Europe, Australia, and Canada. This project focuses on secondary legal and economic sources from these countries.

The research is also conducted through critical doctrinal analysis. Legal rules may be positive or negative, ambiguous or obvious; thus, critical doctrinal analysis methodology is valuable to argue the merits or demerits of current copyright limitations and exceptions in digital age. It is suitable for a thorough study to create a set of suggestions for copyright limitations and exceptions in digital environments. More particularly, the critical method is also employed in this research to evaluate the proper meanings of legal doctrine, such as the three-step test, fair use, fair dealing, and individual uses, as well as exploring the positive and negative impacts of the digital era. Furthermore, it is used to examine the different approaches of developed countries regarding this issue. This method is also conducted to determine the reasons as to why the implementation of copyright limitations and exceptions in Vietnam are unworkable and then provide recommendations.

1.5 SIGNIFICANCE OF THE THESIS

Limitations and exceptions to copyright have been a key part of international debates, as digital technology evolution associated with the boom of the internet has brought more opportunities to all countries, but particularly developing countries, to access, reproduce, and create cultural works and to improve education, health, and economic circumstances. It shifts people from being passive consumers, consuming cultural works, to becoming active user innovation consumers. As a result, all citizens would like to acquire knowledge, not only for commercial purposes but also for enjoyment, self-capacity, and development.

As a developing country, Vietnam lacks knowledge and information for innovation and development. This country should provide enough opportunities for its citizens to obtain knowledge for economic and social progress. Bound by intellectual property agreements, Vietnam cannot provide a weak copyright

protection. One option for this country is to focus on drafting proper limitations and exceptions to copyright.

This research aims to bring the copyright of Vietnam into the current era, and in doing so facilitate development through new models of creativity and innovation. This type of research will also be relevant to many countries beyond Vietnam. The approach taken here seeks appropriate limitations and exceptions to copyright in the digital age and has not been undertaken, either in Vietnam, nor many other developing countries.

1.6 TERMINOLOGY

For the purpose of clarity, it is important to define the terms and phrases used throughout the thesis.

Innovation, as conceptualised by Schumpeter, is ‘simply the doing of new things or the doing of things that are already being done in a new way’⁵⁶. Many other studies have been based on Schumpeter’s theory, or slight modifications of it. For example, according to the Organisation of Economic Co-operation and Development (OECD), innovation is regarded as the ‘implementation of a new or significantly improved product (goods or service) or process, a new marketing method, or a new organisational method in business practices, workplace organisation, or external relation’.⁵⁷ Christopher Freeman stated that ‘an innovation in the economic sense is accompanied with the first commercial transaction involving the new product, process, system, or device’.⁵⁸ Similarly, Christine Greenhalgh and Mark Rogers stated that innovation is ‘the application of new ideas to the products, processes, or other aspects of the activities of a firm that lead to increased value’.⁵⁹ From the scope of firms or enterprises, innovation is thought of ‘as a process, i.e. as any change in a firm’s economic activity implying changes in the use of resource, organisation,

⁵⁶ Joseph A Schumpeter, above note 12 at 151.

⁵⁷ OECD, *Proposal Guidelines for Collecting and Interpreting Technological Innovation Data* (The Oslo Manual, 2nd ed, 1997); Tacke G M L (eds), *Competitiveness of the EU Dairy Industry* (LEI Wageningen UR, 2009) 13.

⁵⁸ Christopher Freeman, *The Economics of Industrial Innovation* (The RMIT Press, 1982) 5.

⁵⁹ Christine Greenhalgh and Mark Rogers, *Innovation IP, and Economic Growth* (Princeton University Press, 2010) 4. The authors in this book also overruled Schumpeter’s definition and said that his definition should be allocated to entrepreneurial activity rather than to innovation.

products, and/or markets'.⁶⁰In short, innovation is the application of knowledge to create additional value and wealth.⁶¹

Innovation is traditionally categorised into two groups: product and process innovation.⁶² Product innovation is the act of bringing new things to the market place that improve the range and quality of products. For example, the Apple iPod is an innovation compared to the Sony Walkman, which was an earlier portable device for playing music. Process innovation is a new way of making or delivering goods or services. For example, a new way of borrowing books in libraries that allows patrons to borrow books by touching the computer and scanning the book's code instead of talking to librarians is a process innovation. Innovation broadly refers to not only new products or process, but also new business processes and new ways of carrying out product activities.⁶³ For example, the introduction of new management or marketing techniques, the adoption of new supply or logistic arrangements, and improved approaches to internal and external communications and positioning are classified as innovations. Innovations that are protected under copyright are not only cultural works such as books, movies, music, and songs (product innovations), but also expressions of new management, techniques, arrangements, or communications. This thesis uses the broad definition of innovation as above.

Society often equates innovation with invention, but the two concepts are clearly distinct among scholars. Invention is broadly defined as the production of new ideas and knowledge,⁶⁴ whereas innovation is the introduction of change via something new.⁶⁵

It has been found in the literature that innovation is the subject of patent law. However, innovation also refers to the creation of cultural works such as novels,

⁶⁰ M Amendola and J L Gaffard, 'The Innovative Choice' in *An Economic Analysis of the Dynamics of Technology* (Basil Blackwell, 1998) 20.

⁶¹ Business Council of Australia, 'New Concepts in Innovation: The keys to a growing Australia' (2006) 6 <<http://www.bca.com.au/Content/100408.aspx>> (retrieved 12 July 2012).

⁶² Christine Greenhalgh and Mark Rogers, above note 59 at 3.

⁶³ Alberto Rodriguez and Carl J Dahlman and Amil Salmi, *Knowledge and Innovation for Competitiveness in Brazil* (The World Bank Study, 2008) 23.

⁶⁴ Kenneth J Arrow, 'Economic Welfare and the Allocation of Resources for Invention' in Richard R Nelson (eds), *The Rate and Direction of Inventive Activity: Economic and Social Factor* (Princeton University Press, 1962) 609-25. Freeman defined 'an innovation [is] an idea, a sketch or model for a new or improved device, product, process or system'. See more at Christopher Freeman, above note 59. Usher defined invention as 'the emergence of new things which require an act of insight going beyond the normal exercise of technical or professional skill'. See more at Payson Usher, *A History of Mechanical Invention* (Harvard University Press, Revised ed., 1988).

⁶⁵ William B Rouse, *Strategies for Innovation* (John Wiley and Sons Inc, 1992).

songs, music, movies, and other subject matters, rather than works such as expressions of technological and non-technological forms of innovation. This thesis considers innovation in the context of copyright; that is, creative expressions generated by creative reuse of existing works.

Development is defined as ‘the improvement of people’s lifestyles through education, income, skills development, and employment’.⁶⁶ It is a multi-dimensional process normally relating to major changes in social structures, popular attitudes, and a national condition of life from unsatisfactory to satisfactory.⁶⁷ ‘Satisfaction’, Servaes explained, means ‘materially and spiritually better’. Simply, development appears when people have decent housing, security, food, clothing, and skills to read and write.⁶⁸ It enriches people’s ‘lives by widening their horizons and reducing their sense of isolation’.⁶⁹ Chambers stated it is ‘good change’⁷⁰ and Nussbaum described it as ‘making things better’.⁷¹

The theory on human development was established by Amartya Sen in 1985 and is known as the ‘capabilities approach’:⁷² an emphasis on human welfare and quality of life, rather than measures of success beyond national competitiveness and GDP. Development, Sen stated, is ‘the removal of various types of freedoms that leave people with few choices and little opportunity for exercising their reasoned agency’.⁷³ Nussbaum then defined the capacities approach as the end goal of development, being to ensure that all human beings enjoy 10 central capabilities, such as the ability to live long and healthy, to be educated, to enjoy freedom, democracy, and participation.⁷⁴ The United Nations (UN) popularised this approach by including important capabilities – health, education, and poverty – in the United

⁶⁶ Center to Bridge the Digital Divide (CBDD), ‘The Meaning of Development, Sustainable Development and Rural Development’ <http://fduniversity.wetpaint.com/page/Meaning+of+Sustainable+Development> (retrieved 13 July 2012).

⁶⁷ J Servaes, *Communication for Development: One World, Multiple Cultures* (Hampton Press Inc., 1999) 77.

⁶⁸ Ibid.

⁶⁹ Joseph E Stiglitz, ‘Towards a new paradigm for development’ UN conference for Trade and Development (1998) <http://archive.unctad.org/en/docs/prebisch9th.en.pdf> (retrieved 13 July 2012).

⁷⁰ R Chambers, above note 16 at 1.

⁷¹ Martha C Nussbaum, above note 19 at 12.

⁷² Amartya K Sen, *Commodities and Capabilities* (Oxford University Press, 1985).

⁷³ Amartya Sen, above note 17 at xii.

⁷⁴ UNDP, above note 17; Amartya Sen, above note 17 at 35.

Nation's Human Development Index (HDI) in order to measure a country's average development.⁷⁵ This thesis adopts the human development paradigm.

In short, 'development' in this thesis refers to human development that encompasses good change in a variety of aspects in society, including economic, social, political, legal and institutional structures, technology, the environment, religion, the arts, and culture.

Developing countries are, according to Kofi Annan, former Secretary General of the United Nations, defined as: 'a genuinely developing country is one in which civil society is able to insist, not only on material well-being, but on improving standards of human rights and environment protection as well'.⁷⁶ The World Bank groups countries by gross national income (GNI) per capita. The term 'developing country' is used to denote low and middle-income countries. Particularly, 121 countries with a GNI of \$12,746 US dollars or less are considered to be developing countries for the year 2015.⁷⁷

Although the WTO reserves some preference rights, and grants technical assistance and training for developing nation members, the WTO has not established a precise definition of a developing country. As a reflection of the principle of sovereignty, it allows a WTO member to declare itself as a developing country.⁷⁸ However, the WTO decides the different groups of developing countries that will benefit from the particular preferences.⁷⁹

⁷⁵ UNDP, 'Human Resource Index: Components of the human development index' <<http://hdr.undp.org/en/statistics/hdi/>> (retrieved 12 July 2012).

⁷⁶ Kofi Annan, 'Introduction' (Speech delivered at the United Nation Conference on Trade and Development, Thailand, 12-19 February 2000) <http://unctad.org/en/docs/ux_tdl365.en.pdf> (retrieved 30 September 2014). There is no universally agreed definition of developing countries. The United Nations organisation even states that 'the designations "developed" and "developing" are intended for statistical conveniences and do not necessarily express a judgement about the stage reached by a particular country or area in the development process'. See more at United Nations, 'Standard Country and Area Codes for Statistical Use' <<http://unstats.un.org/unsd/methods/m49/m49.htm>> (retrieved 7 October 2014).

⁷⁷ The World Bank, 'Data: Country and Lending Groups' (2014) <<http://data.worldbank.org/about/country-and-lending-groups>> (retrieved 30 September 2014).

⁷⁸ WTO, 'Development definition: Who are the developing countries in the WTO?' <http://www.wto.org/english/tratop_e/devel_e/dlwho_e.htm> (retrieved 30 September 2014).

⁷⁹ WTO groups developing countries into five different groups: least developed countries (50 countries), food insecure countries, with the exceptions of the least developed countries (34 countries), developing counties with special needs for rural development (44 countries), significant net agricultural-exporting developing countries (4 countries), and advanced developing countries (14 countries). See more at Jonas Kasteng, Arne Karlsson and Carina Lindberg, 'Differentiation Between Developing Countries in the WTO', Swedish Board of Agriculture International Affairs Division (June 2004) 5

The term ‘developing country’ might be distinguished with least developed countries (LDCs) and developed countries. The United Nations utilises three criteria to indicate LDCs: a low income estimate of the GNI per capita; weak human assets; and high degree of economic vulnerability. Accordingly, 48 countries are included in the LDC groups.⁸⁰ Moreover, the WTO reaffirms the criteria of the United Nation for the least developed countries. Thirty-four WTO nation members are classified as LDCs.⁸¹ Developed countries or advanced countries, industrialised countries, or first-world countries refer to ‘one that allows all its citizens to enjoy a free and healthy life in a safe environment’.⁸² The International Monetary Fund (IMF) identifies 40 advanced nations,⁸³ the OECD establishes 40 members into the ‘developed countries club’⁸⁴, and the World Bank provides the list of 75 high-income countries.⁸⁵ Developing countries are implied to be between developed countries and LDCs.

There has been a certain consensus among scholars on the main features of the institutional environment in developing countries: (1) the presence of high transaction costs often caused by corruption⁸⁶ and weak institutions;⁸⁷ (2) uncompleted, weak or non-existent markets;⁸⁸ (3) few links between segments that make the transmission of information and spillovers difficult;⁸⁹ (4) low innovative capabilities; (5) low level of education.⁹⁰

<http://www2.jordbruksverket.se/webdav/files/SJV/trycksaker/Pdf_rapporter/ra04_14E.pdf> (retrieved 30 September 2014).

⁸⁰ United Nations, ‘List of Least Developed Countries’ (2014)

<http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_list.pdf> (retrieved 30 September 2014).

⁸¹ WTO, ‘Least-developed countries’

<http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm> (retrieved 30 September 2014).

⁸² Kofi Annan, above note 76.

⁸³ IMF, ‘World Economic Outlook: Recovery Strengthens, Remains Uneven’ (April 2014)

<<http://www.imf.org/external/pubs/ft/weo/2014/01/pdf/text.pdf>>.

⁸⁴ OECD, ‘Members and Partners’ <<http://www.oecd.org/about/membersandpartners/>> (retrieved 30 September 2014).

⁸⁵ World Bank, ‘Country and Lending Groups’, above note 77.

⁸⁶ P Collie, ‘The Role of the State in Economic Development: Cross-Regional Experience’ (1998) 7 *Journal of African Economy* 38, 76.

⁸⁷ Joseph E Stiglitz, ‘Markets, Market Failures, and Development’ (1989) 79 (2) *American Economic Review* 197, 203.

⁸⁸ Saniaya Lall, *Science and Technology in the New Global Environment: Implications for Developing Countries* (UNCTAD, 1995).

⁸⁹ Cimoli et al, ‘An enclave-led model of growth: The structural problem of informality persistence in Latin America’ (Paper presented at the GRADE workshop, University of Trento, February 2005) 5.

⁹⁰ UNDP, *Human Development Report 1990* available at <<http://hdr.undp.org/en/reports/global/hdr1990>> (retrieved 13 January 2015), Jean-Eric Aubert, ‘Promoting innovation in Developing Countries: A Conceptual Framework’ (Working paper No 3554, World Bank Policy Research, 2005) 4.

Knowledge is a complicated concept with many dimensions of meaning. The Oxford Dictionary defines it as ‘facts, information, and skills acquired through experience or education; the theoretical or practical understanding of a subject’.⁹¹ Robert Fogelin, a philosopher, stated that ‘knowledge is not simply justified true belief, but it is justified true belief justifiably arrived at’.⁹² Marty Fletcher defined knowledge as ‘accumulated external and explicit information belonging to the community, being leveraged by tacit intrinsic insights that originate within individuals who then may act alone or cooperatively in order to control or integrate with their environment’.⁹³ According to Lea Shaver, the term knowledge refers to ‘data, information, tools, inventions, literature, scholarship, art, popular media, and other expressions of human inquiry and understanding’.⁹⁴ This thesis accepts the broad concept of Lea Shaver.

Access to knowledge relates to the accessibility of knowledge.⁹⁵ Access to knowledge is often connected with as the widespread distribution of knowledge and information to the community for human flourishing.⁹⁶ According to Lea Shaver, access to knowledge must be broadly defined. It not only pertains to the right to access, but also the right to participate. She then identified five key dimensions of access to knowledge: education for information literacy, access to global knowledge, access to knowledge goods, an enabling legal framework, and an effective innovation system.⁹⁷ Access to knowledge is recognised as the central element for human development. Therefore, in order to promote access to knowledge, a country needs to build up knowledge entries based on the above five dimensions. This thesis adopts the conceptual framework of access to knowledge articulated by Shaver.

Similar to the term ‘innovation’, access to knowledge is used in the context of patent law, such as access to medicine or access to computer software codes.

⁹¹ Oxford Advanced American Dictionary, ‘Knowledge’ noun

<http://www.oxfordlearnersdictionaries.com/definition/american_english/knowledge>.

⁹² Robert Fogelin cited by Claudio F Costa, *A Perspectival Definition of Knowledge* (Blackwell Publishing Ltd, 2010) 1.

⁹³ See Marty Fletcher, ‘Guideline for Knowledge Management from Phenomenological Literature’ <<http://www.pacrimcross.com/kmguidelines/defknow.html>> (retrieved 15 July 2012).

⁹⁴ Lea B Shaver, *Access to Knowledge in Brazil: New Research on IP, Innovation and Development* (Yale Law School, 2008) 12.

⁹⁵ Lea B Shaver, ‘Defining and Measuring Access to Knowledge: A Blueprint for an Index of A2K’ (2007) 4 (2) *A Journal of Law and Policy* 1

<http://www.law.yale.edu/documents/pdf/ISP/Shaver_A2K_Index.pdf> (retrieved 7 January 2015).

⁹⁶ Yochai Benkler, above note 25 at 133; Lea B Shaver, *Ibid.*

⁹⁷ Lea B Shaver, above note 94 at 3-4.

However, as stated above, access to knowledge contains five dimensions, and some dimensions are the subject of copyright. For example, access to knowledge for education or to global knowledge is directly related to copyright. This thesis uses this term in the context of copyright.

Copyright is, according to WIPO, defined as ‘a legal term describing rights given to creators for their literary and artistic works’⁹⁸. More particularly, ‘copyright is the legal protection extended to the owner of the rights in an original work that he has created. It comprises two main sets of rights: the economic rights and the moral rights’.⁹⁹ Similarly, the International Federation of Library Associations and Institutions (IFLA) stated that ‘copyright is a person’s exclusive right to authorise certain acts (such as reproduction, publication, public performance, adaptation, dissemination) of his or her original work’.¹⁰⁰

The ‘**copyright limitations and exceptions**’ phrase has various meanings. It could be broadly applied to all limitations and exceptions existing in copyright law, but could be restricted only within the meaning of limitations and exceptions to exclusive rights of the copyright owner. Hence, this section aims to make it clear that this term is used in this thesis in the restricted meaning: limitations and exceptions that restrict the exclusive rights of the copyright owner. The term encompasses instances where a work may be used without permission and payment of remuneration – so-called ‘uncompensated limitations and exceptions’ – as well as the case of so-called ‘statutory/compulsory licences’, where the use of the work does not require the author’s permission but a reasonable payment needs to be made.

By 1994, the term ‘copyright limitations and exceptions’ had not appeared in any jurisdiction, even in IP international treaties. By that time, it had been occasionally stated by IP scholars. This term was formally tracked by the establishment of the *TRIPS Agreement*, and then repeated in WIPO Treaties, including the *WIPO Performances and Phonograms Treaty 1996* (WPPT), *WIPO Copyright Treaty 1996* (WCT) and the *Beijing Treaty*. However, no definition of this

⁹⁸ WIPO, Copyright and Related Rights <<http://www.wipo.int/about-ip/en/copyright.html>> (retrieved 25 November 2012).

⁹⁹ WIPO, Collective management of copyright and related rights <http://www.wipo.int/about-ip/en/about_collective_mngt.html#P17_536> (retrieved 27 November 2012).

¹⁰⁰ IFLA, ‘Limitations and Exceptions to Copyright and Neighbour Rights in the Digital Environment’ (2003) Copyright Bulletin available at <http://portal.unesco.org/pv_obj_cache/pv_obj_id_954BD1DE451035D0266B9CE47EF9CB836F410800/filename/IFLA++Eng.pdf> (retrieved 12 Nov. 12).

term has been found. Additionally, ‘there is no definition in the international and regional instruments of the difference between a “limitation” and an “exception”’.¹⁰¹

In this thesis, the terms ‘limitation’ and ‘exception’ embody different, but related, meanings. According to the Oxford English Dictionary, ‘limitation’ refers to ‘a limiting rule or circumstance; a restriction’;¹⁰² whereas ‘exception’ means ‘a person or thing that is excluded from a general statement or does not follow a rule’.¹⁰³ There is a notable difference between a limitation and an exception: one is a restriction of a rule and the other is an exemption from a rule. Importantly, Lucie Guibault argued that ‘limitations’ and ‘exceptions’ are not to be taken as equivalents. The expression ‘limitations’, which includes ‘exemptions’ and ‘exceptions’, refers to the restrictions imposed on the exercise of copyright owners’ rights. Specifically, the term ‘exception’ is used in some circumstances that do not follow the rule or are excluded from the application of the law.¹⁰⁴ Put differently, limitations to copyright draws a line that restrict exclusive rights of the copyright owner, while exceptions to copyright emphasises exempted circumstances that exclude the user from infringement of copyright. Ficsor stated that

In accordance with the ordinary meaning of the words, an “exception” means that the given acts are exempted from the application of the right concerned, while a “limitation” means that, although the right is applicable, it is limited in a certain way.¹⁰⁵

Ficsor refers to compulsory licences as ‘limitations’ and to the use without authorisation and payment of remuneration as ‘exceptions’;¹⁰⁶ that is to say, a ‘copyright exception’ means that the given acts are exempted from the application of the right concerned. There is no authorisation needed and there is no obligation to pay remuneration. Whereas, a ‘copyright limitation’ means that, although the right is

¹⁰¹ J A L Sterling, *World Copyright Law* (Thomson Sweet and Maxwell, 2003) 434.

¹⁰² ‘Limitation, n’ Online Oxford English Dictionary
<<http://oxforddictionaries.com/definition/english/limitation>> (retrieved 26 September 2013).

¹⁰³ ‘Exception, n’ Online Oxford English Dictionary
<<http://oxforddictionaries.com/definition/english/exception?q=exception>> (retrieved 26 September 2013).

¹⁰⁴ Lucie Guibault, ‘Discussion paper on the question of exceptions to and limitations on copyright and neighbour rights in the digital era’ Council of Europe MM-S-PR (98) 7 (1998) 4<<http://www.ivir.nl/publications/guibault/final-report.pdf>> (retrieved 20 March 2013).

¹⁰⁵ Mihaly J Ficsor, ‘Short paper on the three-step test for the application of exceptions and limitations in the field of copyright’ (Working Paper for the Central and Eastern European Copyright Alliance (CEECA) in the 25th session of the WIPO Standing Committee on Copyright and Related Rights (SCCR), Geneva, 19-23 November 2012) 2.

¹⁰⁶ Mihaly J Ficsor, *The Law of Copyright and the Internet – The 1996 WIPO Treaties, their Interpretation and Implementation* (Oxford University Press, 2002) 257; Mihaly J Ficsor, *Ibid.*

applicable, it is limited in a certain way. For example, an exclusive right is limited to a mere right to remuneration or to a compulsory licence.

Although copyright limitations differ from copyright exceptions, they are both important for users to access copyright works. There is a body of cases where the user is not liable for doing what would otherwise be an exclusive right of the copyright owner. Starting from Article 13 of the *TRIPS Agreement* and then Article 10 of *WCT*, limitations and exceptions have been bundled together. WIPO states that copyright limitations and exceptions are ‘cases in which protected works may be used without the authorisation of the right holder and with or without payment of compensation’. They encompass a substantial use of copyright work but are exempted by special purposes, such as fair use or fair dealing and compulsory licences. The combination of limitations and exceptions constitutes the bundle of users’ rights to strike the balance with the exclusive rights of copyright owners.¹⁰⁷ The concepts are treated together in this thesis.

Fair use is one approach used in drafting copyright limitations and exceptions in national laws. The fair use doctrine was first codified in the *Copyright Act of 1976* (USA), section 107.¹⁰⁸ Under this provision, the use of a copyright work for criticism, comment, news reporting, teaching, scholarship or research was not an

¹⁰⁷ Stephen M Stewart, *International Copyright and neighbouring rights* (Butterworths, 1989) 79.

¹⁰⁸ §107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Section 107, the *Copyright Act of 1976* (USA)

<<http://www.copyright.gov/title17/92chap1.html#107>>.

Actually, the fair use provision originated in case law prior to the *Copyright Act of 1976*. It initially originated in a decision by Justice Story in the 1841 case of *Folsom v. Marsh* 9F. Cas. 342 (C.C.D. Mass. 1841) with the notion of ‘abridgments of copyrighted works that were deemed fair’. It was then developed into the fair use doctrine in the 1869 case *Lawrence v. Dana* 15F. Cas. 26 (C.C.D. Mass. 1869) before becoming part of the *Copyright Act*. See Matthew Sag, ‘The Pre-History of Fair Use’ (2011) 76 *Brooklyn Law Review* 1371.

infringement of copyright if it satisfies the assessment of ‘fairness’ of the use based on a balancing of four factors:

(1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes. The preamble of section 107 offers various purposes favoured by fair use, namely criticism, comment, news reporting, teaching, scholarship and research. However, the list in section 107 is not exhaustive, and other non-enumerated purposes will be examined.

(2) The nature of the copyright work. According to the Supreme Court, the major distinction in valuating this factor is whether the work is factual or fictional. For example, ‘informative works, such as new reports, that readily lend themselves to productive use by others, are less protected than creative works of entertainment’.¹⁰⁹ Another consideration is whether the work is available to the public. Courts are less likely to find fair in the copying of an unpublished work. However, the fact that ‘a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of factors’.¹¹⁰

(3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole. This third factor requires the courts to consider whether the amount of use is reasonable in both qualitative and quantitative terms.¹¹¹ Whether the amount used is reasonable must be determined in light of the size of both the copyrighted work and the work in which it is used, and the economic effect of the portion taken to both works.¹¹² For example, the amount used will be favoured by fair use if it is a small quantity and likewise if the portion used is not central or significant to the entire work. In contrast, it will be rejected as a fair use if the portion used is central or the heart of the original work.¹¹³

(4) The effect of the use upon the potential market for or value of the copyrighted work. This factor requires the courts to consider not only the extent of harm caused by the use, but also ‘whether unrestricted and widespread conduct of the

¹⁰⁹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 496-97 (1984).

¹¹⁰ Title 17 of the U.S. Code §107 (West 2013) <<http://www.copyright.gov/title17/circ92.pdf>> .

¹¹¹ Title 17 U.S. Code §107 (3) (West 2013) <<http://www.copyright.gov/title17/circ92.pdf>>. Also, see at L.Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright: A Law of Users’ Rights* (The University of Georgia Press, 1991) 202.

¹¹² L.Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright: A Law of Users’ Rights* (The University of Georgia Press, 1991) 203.

¹¹³ *Bill Graham Archives, LLC v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

sort engaged in by the defendant...would result in a substantially adverse impact on the potential market for the original'.¹¹⁴

It is worth noting that the assessment of the four factors in determining fair use is not exhaustive, but the courts are required to consider the factors together.¹¹⁵ Should one factor fail to satisfy the fair work doctrine, then one must look to the other factors.¹¹⁶ Indeed, the endless variety of situations and combinations of circumstances that can arise in any particular case preclude the formulation of an exact rule.¹¹⁷ This means that whether a particular use is a fair use is, to a large extent, a matter of judgement.

Fair dealing is the other approach used in drafting copyright limitations and exceptions in national laws. The fair dealing defence was first developed by section 2(1)(i) of the *Copyright Act 1911* (UK), which provided that 'any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary'¹¹⁸, would not constitute an copyright infringement. Under fair dealing, what constitutes fairness is determined by permitted purposes. Fair dealing, therefore, is recognised by its closed-ended mechanism. National legislations that employ the fair dealing approach provide a closed list of limitations and exceptions to copyright. Fair dealing privileges for the specific purposes of criticism or review, research and study, parody or satire, and reporting news are recognised in many countries.¹¹⁹

There are some positive aspects of fair dealing: they are explicit and predictable. In determining whether a use comes within the bounds of a fair dealing defence, the courts apply a two-step process.¹²⁰ First, the use must be for one of the specific purposes provided for in the national copyright act (or a closed-list copyright

¹¹⁴ Campbell, 510 U.S. at 590.

¹¹⁵ It was noted in the House of Representative Report on the 1976 Copyright Bill, House Committee on the Judiciary House Report No.94-1976 to accompany s.22, 94th Congress, 22nd Session (September 1976) 65. It was also emphasized in *Sony Corp.v. Universal City Studios*, 464 U.S. (1984), para 79.

¹¹⁶ L. Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright: A Law of Users' Rights* (The University of Georgia Press, 1991) 202.

¹¹⁷ The House of Representative Report on the 1976 Copyright Bill, House Committee on the Judiciary House Report No.94-1976 to accompany s.22, 94th Congress, 22nd Session (September 1976) 66.

¹¹⁸ Section 2(1)(i) of the *Copyright Act 1911* of the United Kingdom, An Act to Amend and Consolidate the law Relating to Copyright.

¹¹⁹ Australia, for example, inserted new provisions permitting fair dealings with copyright materials for purposes of parody or satire in the *Copyright Amendment Act 2006 (Cth)*, section 41A.

¹²⁰ ALRC, 'Copyright and the Digital Economy' Discussion Paper (May 2013) at 133.

limitations and exceptions' provision). For example, a closed list of copyright limitations and exceptions in Vietnamese copyright law is regulated in Article 25-26 of the *Law on IP 2005* (revised in 2009).¹²¹ In order to conclude a use as fair dealing, the Vietnamese courts must consider whether the use is for one of the purposes such as research or teaching, criticism or review, and so on. If the use falls into a purpose provided by the *Law on IP 2005* (revised in 2009), it might be a legitimate if it satisfies the second process: the use must be fair. The question whether a particular use is fair will depend on the circumstances of the case, subject to guidance as to fairness stipulated by legislators. For example, in the fair dealing exception for the purpose of research or teaching in Vietnamese law, matters to be considered are that only one copy allowed is allowed and that copy must not be for a commercial purpose. Fair dealing for the purpose of criticism or commentary must be the quotation of 'reasonable portion without misrepresenting authors' views.¹²²

However, the fair dealing defence has been criticised as restrictive as it is unable to be developed by the courts. The use of the work for any other purpose is never considered, even though it may be fair. Moreover, the fair dealing approach is not sufficiently broad to provide an effective balance between owners and users in the digital environment. It is not flexible enough to respond to changing circumstances caused by new technologies and uses. This issue will be discussed in Section 6.5 of Chapter 6 of this thesis.

1.7 THESIS OUTLINE

This thesis comprises seven chapters. Each chapter, excluding the introduction chapter, has a specific purpose, which revolves around the objective of introducing proper limitations and exceptions to copyright for Vietnam in the digital environment to promote innovation and development.

Chapter Two sets out the context of the research: Vietnam and its copyright law. Vietnamese copyright law is currently too restrictive to cope with the conditions and needs of the country. High demand for access to cultural expressions for economic growth and building human capabilities, in addition to the desire to favour the public interest, require the copyright law system to balance both rights, or even

¹²¹ Completed provisions of Article 25-26 are stated in section 6.5.1.1 of this thesis.

¹²² Article 25(1)(b) of the *Law on IP 2005* (amended in 2009).

be weighted towards the side of the public. Nevertheless, currently, the copyright laws are too imbalanced, are favoured towards protection for copyright owners, and ignore public access. This system needs to be reformed by rethinking the role of copyright limitations and exceptions to enable more public access for innovation and development in Vietnam.

Chapter Three provides fundamental matters considered to be the basis of this study; that is, the relationship between copyright and innovation and development. The first half of the chapter examines the most important components of innovation and development. It highlights two main elements of an innovation: invention and imitation. Protecting novel knowledge (invention) is an important factor for facilitating innovation. However, ensuring this novel knowledge is diffused within the community is equally important. The chapter then emphasises the role of diffusion of knowledge for innovation. Theories on human development are then investigated. It stresses the importance of enhancing people's capabilities and shows the important role of knowledge flow for improving quality of life. The second half of Chapter Three looks at the relationship between copyright, innovation and development. It recognises that a balanced copyright system is important for innovation and development. Following this, the research is connected to the circumstances of developing countries and whether the current copyright policy is meaningful for developing countries to allow for innovation and development. The key contextual point identified in this chapter is that strong copyright protection in developing countries does not serve innovation and development.

Chapter Four sets out the theory on the role of copyright limitations and exceptions in facilitating innovation and development. Copyright limitations and exceptions are a vital part of keeping copyright in balance. They occur and exist for the public benefit. They restrict the absolute rights of the copyright owner and encourage further innovative creativities. Thus, this chapter begins with the role of copyright limitations and exceptions on facilitating further innovative activities by giving leeway for potential creators to access knowledge, and providing 'start-up capital', which encourages investment into technological sites that contain risks in the digital age. This spurs innovation or economic growth. Moreover, the limitations and exceptions help to repair the market failure that creates barriers for innovation and economic growth. Furthermore, limitations and exceptions to copyright enhance

human capabilities such as learning, play, and freedom of expression and participation. They create more opportunities for all citizens to improve their freedom and enjoyment, preserve cultural knowledge, and foster cultural diversity by providing the public with access to cultural expressions. Additionally, they support education, which is vital for human development, by providing students, teachers, and educational institutions with more access to educational materials without prior permission from the copyright owner.

The central argument of this chapter is to justify the role of copyright limitations and exceptions in promoting innovation and development. It serves to answer the research question: What is the role of copyright limitations and exceptions in promoting innovation and development? Answering this question is important, as it provides strong justification for the objective of this thesis: namely, to provide recommendations for reforming Vietnamese copyright limitations and exceptions provisions to allow for innovation and development.

Chapter Five examines how copyright limitations and exceptions are formulated under international conventions. The general limitations and exceptions stipulated by the three-step test in the *Berne Convention* and beyond are examined to clarify the flexibility of the test and the freedom of nations in implementing the requirements of the test. Requirements to set out specific limitations and exceptions under international level are also investigated. It indicates that international law leaves a large amount of room for nations to create their own limitations and exceptions, from quotation up to open-ended fair use. In addition to the three-step test, the *Berne Appendix* introduces two special limitations and exceptions for developing countries: reproduction and translation compulsory licences. Special limitations and exceptions of the *Berne Appendix* are investigated in depth, to see whether developing countries have any opportunities to obtain advanced knowledge from industrial countries at a reasonable price. The chapter determines that contracting countries can enjoy a lot of freedom in constructing copyright limitations and exceptions provisions in their domestic law, but they cannot lean on special compulsory licences designed for developing countries in order to obtain inexpensive access. Therefore, the only choice for developing countries is to expand their own limitations and exceptions based on the flexible three-step test.

Chapter Six relates to copyright limitations and exceptions in Vietnamese copyright law. It is indicated that copyright limitations and exceptions are too restricted and outdated, and need to be amended. Tests, such as the three-step test, should be removed from legislation. Moreover, Vietnam should adopt fair use instead of fair dealing for greater production and human development. To serve this point, the chapter examines fair use in the US and fair dealing in Australia. This chapter looks at approaches to limitations and exceptions to copyright in some developing countries that have similar levels of development to Vietnam and are active in requesting open zones for access to knowledge, such as Brazil, Thailand, and Chile. Other recommendations for stimulating knowledge access are provided in this chapter, including expanding the rights of access for educational uses, libraries or archives, and for people with disabilities.

Chapter Seven summarises the main arguments of the thesis and provides recommendations. It concludes the key findings from the thesis and gives recommendations on future perspectives on copyright limitations and exceptions for Vietnam to progress innovation and development; namely, adopting the fair use doctrine and expanding substantial copyright limitations and exceptions. The thesis concludes with issues that require further investigation in future research.

Chapter 2: Vietnam and its Copyright Law

Vietnam's Intellectual Property Law is a unique piece of legislation that combines copyright, patents, trademarks, and plant varieties in a single Act... in 2005. One might expect, then, that the law would be modern, and adapted for the digital age. Unfortunately this is only so in the rights-holder's favour.

Consumers International¹²³

2.1 OVERVIEW

This chapter investigates the local context of Vietnam, including its historical, economic, social, and cultural aspects. This section argues that Vietnam has a high demand of access to knowledge due to rapid economic growth. Furthermore, the impact of Confucianism ideologies, in addition to the influence of French civilisation, has created a tremendous desire for achieving knowledge in the Vietnamese people. To promote innovation and development, Vietnam needs scientific knowledge that is mostly accumulated in written forms protected by copyright law. Therefore, Vietnam requires access to copyright works. Moreover, its politics, legal condition, and Confucianism ideals favour giving priority access to the public. A flexible copyright law system that provides broad access for the public is expected to fit with all of these aspects. However, the current Vietnamese copyright law system contradicts this. This thesis argues that Vietnamese copyright is currently skewed to the side of the copyright owner, while paying little attention to limitations and exceptions to copyright, making the copyright system imbalanced. Consequently, Vietnamese citizens face challenges to accessing copyright material required for greater production and building capabilities. Therefore, it is necessary for the country to re-balance its copyright law by expanding the scope of copyright limitations and exceptions.

This argument operates as the central anchor for this thesis and sets out the research problem: that the copyright law in Vietnam is too restrictive to address the high knowledge demand accumulating in cultural expressions of the population. This

¹²³ Consumers International, 'Vietnam' <<http://a2knetwork.org/reports/vietnam>> (retrieved 20 January 2014).

problem needs to be addressed by developing limitations and exceptions to copyright appropriate to the local context.

2.2 VIETNAM HAS A HIGH KNOWLEDGE DEMAND FOR INNOVATION AND DEVELOPMENT

Vietnam, officially the Socialist Republic of Vietnam, is the eastern-most country on the Indochina Peninsula in Southeast Asia. It is bordered by China to the north, Laos to the north-west, Cambodia to the south-west and the East Sea to the east. With an estimated 91,669, 433 inhabitants in 1 January 2015,¹²⁴ Vietnam is the world's 13th most-populous country, and the eighth-most populous Asian country.¹²⁵ This country requires horizontal knowledge to innovate, learn, play, and entertain. This section demonstrates that Vietnam has a high demand for knowledge for development which stems from its level of economic growth, in addition to aspects of its history and culture.

2.2.1 High knowledge demand for economic growth

Due to being a transitional developing country, Vietnam requires knowledge for its economic growth. Vietnam no longer suffers from food poverty. Deep poverty has declined significantly and is now smaller than that of China, India, and the Philippines.¹²⁶ However, Vietnam is faced with knowledge poverty. In fact, advanced knowledge is mostly generated and accumulated in developed countries.¹²⁷ Innovation and development in Vietnam are driven by the adoption of knowledge – innovations, technologies, and cultural products – from developed countries, because ‘the innovation process is cumulative, and requires a starting point’.¹²⁸ That starting point has been mostly determined by imported knowledge (innovations). Some innovations may have been made by the Vietnamese, but this rare and usually requires technology imported from overseas. With its rapid pace of economic growth

¹²⁴ Countrymeters, Vietnam Population <<http://countrymeters.info/en/Vietnam>> (retrieved 20 August 2015).

¹²⁵ Vietnamventures, Brief History of Vietnam at <www.vietventures.com/Vietnam/history_vietnam.asp> (retrieved 10 October 2011).

¹²⁶ Global Investment and business Center USA, *Vietnam Business Law Handbook* (International Business Publication, USA, 2007) 24.

¹²⁷ Robert M Sherwood, ‘The TRIPS Agreement: benefits and costs for developing countries’ (2000) 19 (1/2) *Intellectual Journal Technology Management* 57; Richard Watt, ‘An empirical analysis of the economics of copyright: How valid are the results of studies in developed countries for developing countries?’ (2007) *The Economics of IP* 65, 88.

¹²⁸ Richard Watt, *ibid.*

of approximately 7% per year from 1986,¹²⁹ local knowledge has not been able to meet the high demand of increasingly copyright-based industries, such as publishing, music, games, and computer software. Moreover, the widespread of knowledge-based industries has raised the requirement for obtaining advanced knowledge to educate the workforce. For example, software development and electronics manufacturing industries have been booming in Vietnam over the last five years. These industries generated \$38 billion in export turnover for the country in 2013 and are expected to contribute 8-10 percent of the GDP by 2020.¹³⁰ This means the country must provide a total of 411,000 trained information technology workers.¹³¹ Therefore, Vietnam needs broad access to knowledge, at least for education, for purpose of innovation and development.

Furthermore, as one of the most attractive locations in the world for Foreign Direct Investment (FDI),¹³² Vietnam has taken advantage of knowledge transfer from the developed world. Therefore, a proper policy for copyright might advance the circulation of knowledge in the country. After shifting to an open market policy in 1986, in addition to other factors such as cheap labour costs, highly-educated workforce, sizeable domestic market, and geographical advantages, Vietnam has been increasingly attracting FDI, especially after becoming a member of the WTO. Vietnam has been referred to as ‘China plus one’¹³³ in terms of attracting FDI. Along with FDI, knowledge has transferred to Vietnam via the transfer of technologies, the training of employees in foreign companies, as well as the residence of highly-

¹²⁹ GDP growth averaged around 9% per year from 1993 to 1997, 6.8% per year from 1998 to 2004, 8% in 2005, and 7.8% in 2006. This economy was evaluated 10 times in the late 1980s to 2006 at \$61 billion, making Vietnam the 58th largest economy in the world in this year, up from 76th in 1986. Growth remained strong even in the face of the late-2000 global recession, holding at 6.8% in 2010 and 5.8% in 2011. General Statistic Office of Vietnam, 2011 social – Economic Statistical Data (January 2012) <<http://www.gso.gov.vn/default.aspx?tabid=622&idmid=&ItemID=12133>>; Centre Intelligent Agency, The World Factbook: Vietnam (17 January 2012) <<https://www.cia.gov/library/publications/the-world-factbook/geos/vn.html>>.

¹³⁰ Hawkins Pham, ‘Computer Science in Vietnam: Counting Down to The Hour of Code’ *Forbes* (online), 18 December 2014 <<http://www.forbes.com/sites/techonomy/2014/12/18/4560/>> (retrieved 10 March 2015).

¹³¹ Ibid.

¹³² FDI in Vietnam increased to USD\$8004.80 million in the fourth quarter of 2014 from USD\$2779.50 million in the third quarter of 2014. It averaged USD\$3667.60 million from 2001 until 2014, reaching an all-time high of USD\$25790.92 million in the second quarter of 2008 and a record low of USD\$-2649.50 million in the fourth quarter of 2006. The General Statistics Office of Vietnam, FDI in Vietnam available at <<http://www.tradingeconomics.com/vietnam/foreign-direct-investment>> (retrieved 2 March 2015).

¹³³ Kensuke Yanagida, ‘Looking for a plus-one, Japan turns to Vietnam’ Japan Institute of International Affairs (23 October 2014) <<http://www.eastasiaforum.org/2014/10/23/looking-for-a-plus-one-japan-turns-to-vietnam/>> (retrieved 2 March 2015).

educated foreign experts. This means that advanced knowledge has occurred in the country via FDI. A smart copyright policy could make a big impact – a proper transfer channel within society to legally extract knowledge accumulated inside FDI industries spread throughout the society. A copyright system with a broad scope of limitations and exceptions might address the question of access.

2.2.2 High knowledge demand for building human capabilities

Vietnam is a culturally diverse nation; therefore, sharing knowledge is encouraged. It embraces 54 ethnic groups, but 90% population fall into the King ethnic group. Moreover, throughout history, the country has constantly fought for its culturally independent identity, as well as the preservation of traditional values. However, the tumultuous history of Vietnam has brought many cultural influences to Vietnamese society.¹³⁴ Nguyen et al. described Vietnam as ‘an emerging Asian less developed country, dominated by a Confucian-Socialist market economy with a long exposure to western values’.¹³⁵ Due to cultural diversity, sharing knowledge among ethnic groups and between Vietnam and the world is incentivised to achieve equitable development throughout the country, as well as making progress towards the level of the developed world.

Furthermore, due to the deep influence of Confucian values and ideals imported from China,¹³⁶ Vietnam continually prioritises education and achievement of knowledge. As one of the basic components of Confucianism ideology, Vietnamese people have a great love of learning. They believe that ‘the only way for the superior man to civilise the people and establish good customs is through

¹³⁴ From 1889 to mid-19th century, the country was colonised by the French. Efforts to resist the French eventually led to their expulsion from the country in the mid-20th century, leaving Vietnam politically divided into two countries. Fighting between the two sides continued, with heavy foreign intervention of the American military during the Vietnam War, which ended with a North Vietnamese victory and the Socialist Republic of Vietnam was established in 1975. See more at Vietnam Ventures, above note 125.

¹³⁵ Q T N Nguyen, P A Neck and T H Nguyen, ‘The inter-relationships between entrepreneurial culture, knowledge management and competitive advantage in a traditional economy’ (Paper presented at the 17th Biennial Conference of the Asian Studies Association of Australia, Melbourne, 1-3 July 2008).

¹³⁶ The Vietnamese people became independent from China in 938 AD and extended geographically into Southeast Asia, throughout the Indochina Peninsula. Vietnamventures, above note 125; Gowning Dong, Chua Gia Liem and Martin Grossman, ‘Knowledge-sharing intention in Vietnamese organisations’ (2010) 40 *VINE* 262, 270
<<http://www.emeraldinsight.com/doi/full/10.1108/03055721011071395#>> (retrieved 10 October 2011); Q T N Nguyen, P A Neck and T H Nguyen, ‘The inter-relationships between entrepreneurial culture, knowledge management and competitive advantage in a traditional economy’ (Paper presented at the 17th Biennial Conference of the Asian Studies Association of Australia, Melbourne, 1-3 July 2008).

education'.¹³⁷ The people have a love of learning and a desire to obtain knowledge. As a result, the country presents a high demand for gaining access to knowledge. It was reported by Cimigo that Vietnam has experienced a rapid growth of internet penetration over the last few years, similar to China, the Philippines, and Thailand. The most important activity of the population on the internet is information and knowledge-gathering.¹³⁸

As a matter of culture, Vietnamese people are in favour of free reproduction of expression for education. Confucius stressed repetition or memorisation as the important methods of acquiring knowledge. Hence, in Confucian-based societies such as Vietnam, 'the development of the ability to use imitation and repetition as an aid to learning is encouraged'.¹³⁹ People are encouraged to learn and reproduce other expressions accurately. For example, at school, education is based on examination and memorisation; students are expected to have great knowledge, rather than critical thinking. As a result, in terms of education, there is no shame if someone incorporates or uses someone else's work into their works without permission. Additionally, the authors whose works are reproduced in classes without permission are generally more proud than hurt. It is a privilege that educational material is used in this manner in Vietnam.

Furthermore, Vietnam is characterised as a net importer¹⁴⁰ of cultural products. In spite of a dramatic change from the 1990s, cultural industries (press, television, radio broadcasting, publishing and printing, film, video and photography, music, visual arts and performing arts, handicraft, fashion, software, and computer games) have not been recognised as major factors in the development of the economy. They are not included in the economic structures. There is also no national statistic system in place for cultural industries.¹⁴¹ Using the film industry of Vietnam as an example,

¹³⁷ Lin Yutang, *The Wisdom of Confucius* (Michael Joseph, 1958) 200. This idea is important to support flexible and broad limitations and exceptions to copyright for education, because this country considers education the priority. Its opinion is heavily influenced by Confucius.

¹³⁸ Cimigo, '2011 Vietnam NetCitizens Report: Internet Usage and Development in Vietnam' (April 2011) <<http://www.cimigo.com/en/research-report/vietnam-netcitizens-report-2011-english>> (retrieved 02 March 2015).

¹³⁹ Purdie Nola, 'Education Statistics' (1995) 4 News Sheet, No. 6 Data Management Unit, Ministry of Education, p3.

¹⁴⁰ OECD, 'Vietnam and Policy Framework for Investment' (2007) <<http://www.oecd.org/countries/vietnam/viet-nam-pfi.htm>>.

¹⁴¹ World CP-International Database of Cultural Policies, 'Vietnam/4.2. Specific policy issue and recent debates' <<http://www.worldcp.org/vietnam.php?aid=423>> (retrieved 28 October 2014).

according to IIPA, Vietnam produces only about 20 films per year.¹⁴² Nevertheless, the wide demand of foreign cultural products, particularly entertainment products, has been emerging in society since the 1990s. Foreign music and movies have been heavily imported into the Vietnamese market, making ‘international mass media available to majority of the population’.¹⁴³ In an attempt to protect national cultural products, the Vietnamese government used to control the importation rates of foreign cultural products. For example, in 2008, Vietnam put a limit in place so that the total number of foreign films imported into Vietnam each year did not exceed two-thirds of the number of films domestically produced.¹⁴⁴ In addition, the amended cinematography law set a quota at 20% for Vietnamese feature films in theatres.¹⁴⁵ However, under pressure from foreign countries, especially the US, the country has now eliminated barriers of market access with respect to production, importation, and distribution of copyright materials, whether in the physical or online/mobile marketplace.¹⁴⁶ As a result, imported cultural products are rampant in Vietnam. Vietnam is a net importer of cultural products; therefore, restrictive copyright protection would make foreign cultural works costly, as well as blocking the flow of information and entertainment of the society. It would impede the development of Vietnam. Therefore, Vietnam should construct copyright law that supports the acquisition of knowledge at a reasonable price.

2.3 VIETNAMESE PEOPLE PRIORITISE THE PUBLIC INTEREST OVER PRIVATE RIGHTS

As a matter of culture, Vietnamese people respect public interest more than private benefit. Confucius ideology influences views on the balance between private and public interest. Confucius made the benefit of a group or society the priority, rather than personal profit.¹⁴⁷ In light of this ideology, copyright balance should be skewed towards public interest rather than the private rights of copyright holders.

¹⁴² IIPA, ‘Vietnam-2014 Special 301 Report on Copyright Protection and Enforcement’ (2014) <<http://www.iipa.com/rbc/2014/2014SPEC301VIETNAM.PDF>> (retrieved 29 October 2014).

¹⁴³ Huong Le Thu, ‘Cultural policy as sustainable development strategy in the case of Vietnam in post-Doi Moi era; (Paper for the APEA 7th Conference, Busan 24-25 June 2011) 5.

¹⁴⁴ ‘Vietnam-U.S. Trade Representative’ (2008) <https://www.ustr.gov/sites/default/files/uploads/reports/2009/NTE/asset_upload_file842_15514.pdf> (retrieved 29 October 2014).

¹⁴⁵ The amended *Cinematography Law of Vietnam*, Article 10.

¹⁴⁶ IIPA, ‘Vietnam-2014 Special 301 Report on Copyright Protection and Enforcement’ (2014) <<http://www.iipa.com/rbc/2014/2014SPEC301VIETNAM.PDF>> (retrieved 29 October 2014).

¹⁴⁷ June Cohan Lazar, ‘Protecting ideas and ideals: Copyright law in the People’s Republic of China’ (1995-1996) 27 *Law and Pol’y Int’l Bus.* 1185, 1201.

Flexible copyright limitations and exceptions should be encouraged, rather than favouring copyright protection.

Politically, as a socialist country, Vietnam has been heavily influenced by Marxism philosophy; therefore, public benefit is prioritised over private interest. After integrating both sides, Vietnam has pursued the socialist politics based on Marx's philosophy. According to the Marx ideology, 'the creating individual owes his livelihood and education to the society that produced him...his mental labours were social, and hence, the products of them should belong to society as a whole'.¹⁴⁸ In Vietnam, this has been witnessed by the domination of state-owned economic entities, as well as the priority of public ownership over private ownership that has existed in the country for 40 years.¹⁴⁹

In terms of legal conditions, Vietnamese law has been largely influenced by Marxist ideology. Prior to 1992, Vietnam applied traditional Marxism, which considers public property essential to economic growth and the acquisition of private property was forbidden. After that, Vietnam enacted the *Constitution of Vietnam 1992* (amended in 2001 and 2013)¹⁵⁰ to create a favourable environment for the

¹⁴⁸ John N Hazard, *Communists and Their Law* (University of Chicago Press, 1969) 243-268 cited by Carla Hesse, 'The rise of IP, 700B.C-A.D.2000: an idea in the balance' (2002) 131 (2) *Daedalus* 26, 43.

¹⁴⁹ After reunifying in 1975, Vietnam developed a state-regulated economy, which was based on the Soviet Union economic model and Marxist ideologies. In particular, the centrally planned and commanded economy was employed as the main mechanism for the ruling government to run the country. It was dominated by state-owned enterprises, which operated inefficiently under subsidising policies in markets insulated by many types of barriers and distorted by a variety of administrative regulations and interventions. In such an economy, private ownership, property rights, and IP rights were prohibited. A chain of failures of economic policies, plus the consequences of the War, the lack of human resources, the lack of infrastructure, the loss of financial support from the old Soviet Union, and isolation from the world economy pushed Vietnam into currency devaluation and starvation in the mid-1980s. The problems forced the Vietnamese government to implement several reforms under the program of economic renovation (*Doi Moi*) in 1986, focusing on market-oriented economic management and implementing the open-door policy. This policy was successful, as the country went from an extremely low level of development to significantly reducing poverty. In shifting from a closed market to an open market policy, Vietnam has been able to pursue socialist politics where public ownership is determinant and drives other types of ownership. See more at Tu Thanh Nguyen, *Competition Law, Technology Transfer and the TRIPS agreement: Implications for Developing Countries* (Edward Elgar, 2010) 212; Tran Thi Lan Anh, Vietnam: Public Interests and the Protection of Intellectual Property Holder Rights in the TRIPS Agreement and the Socialist Republic of Vietnam, *Modaq* (09 December 2003) <<http://www.mondaq.com/article.asp?articleid=23651>>; American Chamber of Commerce in Vietnam, Vietnam: A guide for business and Investment (2008) 13 <http://www.amchamvietnam.com/1099>; Ha Huong, Vietnam Economic Transition in the Perspectives of Public Policy in the Post Economic Crisis.

¹⁵⁰ Historically, the Social Republic of Vietnam experienced four different Constitutions, which were enacted in 1946, 1959, 1980 and 1992. Each Constitution has been amended to keep up to date with society's progress. The current Constitution is the *Constitution of Vietnam 1992* – although this Constitution has been subjected to two amendments the name remains the same. In this thesis,

development of a multi-factor market economy. According to the 1992 *Constitution*, private ownership and property rights, including IP and the right to set up enterprises, as well as to freely engage in business, are clearly recognised and protected.¹⁵¹ Significantly, the *Constitution* declares that the rule of law is fully respected. The government manages the society by law, and all entities in society including the government must act based on the law. The State protects the legal capital and property of business establishments. Property may be nationalised only for reasons of security, national defence, or for the national interest, with compensation at market prices and according to procedures as defined by law.¹⁵² Many laws and regulations have been enacted and/or amended to establish the legal framework complying with the basic principles of the *Constitution* and the open-door policy. In spite of great movement, Marxism is still a major influence in the legislation of the country. Marxism, like Confucianism, views that a group is more important than the individual.¹⁵³ These ideologies provide a strong argument for crafting a copyright law system that slants towards the public interest.

2.4 VIETNAMESE COPYRIGHT LAW IS UNDULY RESTRICTIVE

There is an expectation that Vietnamese copyright law should be introduced in a way that facilitates the knowledge demand of the public and benefits the public interest. Unfortunately, copyright law in Vietnam is currently extremely restrictive, favouring the privatisation of knowledge, and pays little attention to public access.

Vietnam has a short history of copyright law, but the history accompanies the increased level of protection for the copyright owner. The first Vietnamese legislation of copyright protection was formed in 1986 by the Council of Ministers (*Arrete No.142/HDBT* regulating authors' rights) which provided protection at a basic level. This *Arrete* granted copyright protection to the author for his/her life, plus 30 years. It provided protection for subject matters of literary, artistic, and

references to the 1992 *Constitution* includes the original 1992 Constitution plus the two amendments in 2001 and 2013.

¹⁵¹ The *Constitution of Vietnam 1992*, arts 21, 57 and 58; General Statistic Office of Vietnam, 2011 social – Economic Statistical Data (January 2012)

<<http://www.gso.gov.vn/default.aspx?tabid=622&idmid=&ItemID=12133>>; Centre Intelligent Agency, The World Factbook: Vietnam (17 January 2012)

<<https://www.cia.gov/library/publications/the-world-factbook/geos/vn.html>>.

¹⁵² The *Constitution of Vietnam 1992*, arts 22-3.

¹⁵³ June Cohan Lazar, 'Protecting ideas and ideals: Copyright law in the People's Republic of China' (1995-1996) 27 *Law and Pol'y Int'l Bus.* 1185, 1205.

scientific works created in a certain forms of expression. Unfortunately, the 1986 law was quickly terminated, as it was enacted on the basis of the 1980 *Constitution*, which encouraged a centrally-planned economy, while the economic policy had changed to a market-oriented economy and, as such, the open door policy (the innovation of *Doi Moi*) was implemented just a few days after this document.¹⁵⁴

Next, the *1994 Ordinance on Copyright Protection*, which replaced *Arrete No. 142*, increased the protection significantly. It extended to broad categories of works, as long as they were fixed in a certain form.¹⁵⁵ Moreover, it offered, for the first time, remedies for copyright infringement. Under the *Ordinance*, an author could ask the infringer to stop using copyrighted material and recoup compensation for any damages suffered by illegal use of the work. Alternatively, the author could ask the Department of Copyright or other competent authorities to intervene in order to stop pirates or bring the case to the courts. Additionally, it regulates six fundamental rights for authors: authorship, recognition, integrity, publication, receiving remuneration, and exploitation.¹⁵⁶ The protection period extended to the lifetime of the author, plus 50 years.¹⁵⁷ The *Ordinance* is said to be an excellent improvement that increases the level of protection.¹⁵⁸

After opening the door to the world, Vietnam attempted to be recognised as a nation committed to the protection of copyright based on international standards. With the intention to join the WTO, Vietnam had to satisfy the requirements of the *TRIPS Agreement*, which sets out the substantive requirements of IP protection that members of the WTO must meet. As a first step toward achieving WTO compliance, Vietnam enacted the *Civil Code 1995*, Part 6. The *Code* has been seen as a dramatic improvement for protection of copyright based on the international standards such as *TRIPS* and *Berne*. Accordingly, the protection was stronger. The author was protected for both moral and economic rights.¹⁵⁹ Therefore, authors who adapt, edit,

¹⁵⁴ *Arrete 142/HDBT* enacted on 14 December 1986, whereas the program of Innovation (*Doi Moi*) was affirmed on 18 December 1986.

¹⁵⁵ Article 17(1) of the *Ordinance*.

¹⁵⁶ Article 10 of the *Ordinance*.

¹⁵⁷ Article 17(93) of the *Ordinance*.

¹⁵⁸ David Lange, 'Vietnam's 1994 Ordinance on Copyright Protection: A survey and preliminary analysis' 1995 1 (3) *Journal of IP Law* 1, 1-24.

¹⁵⁹ Article 751 of the *1995 Civil Code* defined economic rights as the right to receive remuneration for the publication, republication, performance, modification, translation, and broadcasting of a work. Moral rights under art 752 are those which protect the honour and integrity of a work against

rewrite, or transform works enjoy economic and moral rights, but must pay remuneration to and obtain permission from the author or owner of the modified work.¹⁶⁰ Authors who translate works may enjoy economic and moral rights except for the right to name the work.¹⁶¹ Additionally, a new definition of ‘author’ enlarged the number of protected works, including written works, photographic works, scientific projects, computer software, and artistic performances, radio and television broadcasts.¹⁶² Likewise, criminal penalties for copyright infringement were established under s 131 of the *Criminal Code 1999* and more attention was paid to enforcement by competent authorities. A variety of implementing documents was enacted to provide guidance on the implementation of copyright protection.¹⁶³

As part of joining the WTO, Vietnam committed to amending a number of its laws, including the copyright law, to ensure that its copyright fully achieved compliance with the requirements for membership. Commentators indicated that the *Civil Code 1996* did not provide equal treatment for the interests of foreign authors within Vietnam.¹⁶⁴ In addition, the most favoured nation principle is not respected in Vietnam, as the law gives right holders claiming under the *Bilateral Trade Agreement (BTA) VN-US* more favour than that from all other WTO member countries. Furthermore, Vietnam had ‘a number of provisions under its *Civil Code* which appear to be broader than may be defensible under *Berne*’.¹⁶⁵ Therefore, not surprisingly, a separate IP law called the *Law on IP 2005 (amended in 2009)* was

mutilation, the right to claim or declare authorship of a work, the right to name, and the right to have one’s name mentioned in connection with the public use of the work.

¹⁶⁰ Article 751(1) of the *Civil Code 1995*.

¹⁶¹ Article 748 of the *Civil Code 1995*.

¹⁶² Article 773-9 of the *Civil Code 1995*.

¹⁶³ The field of copyright and related rights is regulated by the provisions of the *Civil Code 2005*, the *Law on IP 2005 (amended in 2009)*, the *Decree No. 100/2006/ND-CP* on detailed regulations and guidance to the implementation of a number of provisions in the *Civil Code 2005*, and *Decree 85/2011/ND-CP* amending and supplementing a number of articles of the government’s *Decree No. 100/2006/ND-CP* of 21 September 2006. Furthermore, other specific laws such as the *Criminal Code 1999 (amended 2009)*, *Publishing Law*, *Press Law*, *Cinematographic Law*, the *Law on Information Technology and Library Ordinance* also have provisions relating to copyright and related rights. The *Criminal Code 1999 (amended 2009)* and *Ordinance* on administrative fines and punishments have provisions to handle the infringement liability on copyright and related rights. *Decree 76/CP* (29 November 1999) provides explicit guidance on the implementation of copyright protection. *Circular 27/2001/TT-BVHTT* (10 May 2001) provides additional guidance to the Ministry of Culture and Information on implementation of copyright protection.

¹⁶⁴ Michael W Smith, ‘Bringing Developing Countries’ IP Laws to TRIPS Agreement Standards: Hurdles and Pitfalls Facing Vietnam’s Effort to Normalize an IP Regime’ (1999) 31 *Case Western Reserve Journal of International Law* 221, 243; Margaret Ann Wilkinson, ‘The Challenges of Copying with IP Regime Implementation: Observations on Canada and Vietnam’ (2002) 16 *IP Journal* 45, 62.

¹⁶⁵ Margaret Ann Wilkinson, *ibid* 66.

more strict than ever before.¹⁶⁶ It introduced the broad bundle of exclusive rights for copyright owners: both economic rights (the right of making a derivative work, right of reproduction, right of distribution, right of communication to public, right of rental, and right of exhibition) and moral rights (right to title the work, right to attachment, right to publication, and right of integrity). All exclusive rights of the copyright holder extended by *TRIPS* are included in Vietnamese copyright law. The term of protection is 50 years, plus the lifetime of the author, or 75 years from the date of first publication for cinematographic works, photographic works and works of applied art, and anonymous works. In accordance with international convention, works of foreign authors are protected the same way as domestic authors if the authors are citizens of countries that have agreements with Vietnam or are member of the same conventions that Vietnam is a party to. Additionally, infringement of copyright in Vietnam is able to be concluded either through civil¹⁶⁷ or criminal liability.¹⁶⁸

Contemporary scholars state that international copyright obligations set out by *Berne*, *Rome*, *TRIPS*, *WCT* and *WPPT* are overprotective.¹⁶⁹ They believe overprotective international copyright is actually generated by developed countries and then forced onto the developing world, which differ significantly from the developed world in levels of development, politics, and culture.¹⁷⁰ Academics

¹⁶⁶ The Copyright Office of Vietnam, Overview of Copyright in 2008, <http://www.cov.gov.vn/cbqen/index.php?option=com_content&view=article&id=769&catid=49&Itemid=96> (retrieved 10 October 2011).

¹⁶⁷ *Decree 131/2013/ND-CP* on administrative penalties for copyright and related rights infringement, into force 15/12/2013 <<http://www.cov.gov.vn/cbq/attachments/article/1337/ND131.pdf>> (retrieved 8th January 2014).

¹⁶⁸ *Criminal Code 2009*, art 170a.

¹⁶⁹ See Ruth L Okediji, above note 53; Lauren Loew, 'Creative Industries in Developing Countries and Intellectual Property Protection' (2006) 9(1) *Vanderbilt Journal of Entertainment and Technological Law* 171, 177; Michael J Finger, 'Introduction and Overview' in *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (World Bank Publications, 2004) 1; Marci A Hamilton, 'The TRIPS Agreement: Imperialistic, Outdated, and Overprotective' (1996) 29 *VAN J TRANSNAT'L* 613, 615; Andreanne Leger, 'The Roles of IPRs for Innovation: A Review of the Empirical Evidence and Implications for Developing Countries' Working Paper <<http://www.diw.de/deutsch/produkte/publikationen/diskussionspapiere/aktuell/index.jsp>>; Carsten Fink and Carlos A Primo Braga, 'How stronger protection of IPRs affects International trade flows' in *Intellectual Property and Development: Lessons from recent economic research* (World Bank Publication, 2005) 19-22; Rami Olwan, *Intellectual Property and Development: Theory and Practice* (PhD Thesis, 2011) 16; Carsten Fink and Carlos A Primo Braga, 'How stronger protection of IPRs affects International trade flows' in *Intellectual Property and Development: Lessons from recent economic research* (World Bank Publication, 2005) 22.

¹⁷⁰ *Ibid.*

therefore protest the view of ‘one size’s Western-style IPRs fit for all’.¹⁷¹ In order to be a part of global trade, Vietnam, like other developing countries, has been pushing to join regional and international regimes, including the copyright regime, which is modelled by the developed world to favour owners’ rights. This overprotective regime is not applicable for Vietnam at all.

Despite overly strong protection, piracy and Intellectual Property Rights (IPR) infringements are still widespread in Vietnam. The piracy rates in the software industry and music industry were recorded at 84% and 90% respectively.¹⁷² Book and journal publishers also suffer from uncontrolled piracy, in the form of illegal reprints, translations, and photocopies. Approximately 90% of the English language teaching works have been disseminated without authorisation.¹⁷³ In terms of enforcement, despite making a lot of effort, there has been little positive recent development. The Copyright Office of Vietnam in its 2008 reports admitted that ‘the Inspectorate of the Ministry of Culture, Sports & Tourism (MOCST) has made every effort, but is unable to meet the requirement to establish order in the field of copyright and strictly handle the organisations and individuals who violate copyright and related rights’.¹⁷⁴ Such issues remain of concern to the United States, leading the Office of the US Trade Representative to place Vietnam on its Special 301 Report ‘Watch List’ of Nations whose IPR practices remain inadequate.¹⁷⁵ As a result, Dr Vu Manh Chu, General Director of the Copyright Office of Vietnam, said that ‘the violations have negative effects on creative activities, the investment environment,

¹⁷¹ Lauren Loew, above note 169 at 185; Madhavi Sunder, ‘IP3’ (2006) 59 (2) *Stanford Law Review* 257, 260; K E Maskus, ‘Intellectual Property Rights and Economic Development’ (2000) 32 *Case Western Journal of International Law* 471, 473.

¹⁷² Office of the United States Trade Representative, ‘*International Intellectual Property Alliance, Special 301 Report on Copyright Protection and Enforcement 2010*’ (2010) <<http://www.ustr.gov/about-US/press-office/reports-and-publications/2010/2010-special-301-report>> (retrieved 10 October 2011)

¹⁷³ Office of the United States Trade Representatives, ‘*International Intellectual Property Alliance, Special 301 Report on Copyright Protection and Enforcement 2010*’ (2010) <<http://www.ustr.gov/about-US/press-office/reports-and-publications/2010/2010-special-301-report>> (retrieved 10 October 2011).

¹⁷⁴ The Copyright Office of Vietnam, Overview of copyright in 2008, <http://www.cov.gov.vn/cbqen/index.php?option=com_content&view=article&id=769&catid=49&Itemid=96>

¹⁷⁵ Office of the United States Trade Representatives, ‘*International Intellectual Property Alliance, Special 301 Report on Copyright Protection and Enforcement 2001, 2002... and 2011*’ <<http://www.ustr.gov/about-USE/press-office/reports-and-publications/2011/2011-special-301-report>>; Embassy of the United States Hanoi, Vietnam, ‘IPR Toolkit for the Socialist Republic of Vietnam’ (14 December 2011) <http://www.amchamvietnam.com/1099> (retrieved 13 January 2014).

social and cultural development, and the nation's integration into the world economy'.¹⁷⁶

In seeking an answer for the rampant copyright infringement in Vietnam, some blame ineffective enforcement.¹⁷⁷ However, one of the important reasons is that the Vietnamese copyright system is tremendously imbalanced. Over-protection is provided for the copyright owner,¹⁷⁸ while there are few workable limitations and exceptions to copyright.¹⁷⁹ Consequently, ordinary people have had their rights to access taken away by the shortage of important limitations and exceptions, in addition to the impractical and small scope of existing limitations and exceptions, which forces them to seek an alternative, illegal method.¹⁸⁰ This leads to students and teachers infringing copyright law every day, when they have to reproduce entire textbooks or journal articles without prior authorisation. Librarians often break copyright law when they try to digitalise a work in poor condition for the purpose of preservation.

The structural imbalance poses a serious risk to the flow of knowledge in Vietnam. This has led to students consuming outdated knowledge in textbooks translated from the Russian language from the 1980s.¹⁸¹ Libraries in Vietnam 'are unattractive and under-resourced to meet the tremendous demand for study and research'.¹⁸² People in remote areas are not able to reach fresh knowledge.¹⁸³ Those shortcomings stem from the lack of proper privileges for libraries. In her article, Thu

¹⁷⁶ Vietnamnews.biz, 'Vietnam to clamp down on copyright infringement' (09 January 2009) <http://www.vietnamnews.biz/Vietnam-to-clamp-down-on-copyright-infringement_51.html> (retrieved 10 October 2011).

¹⁷⁷ IIPA, for example, has concluded in their reports every year that the reason for piracy in Vietnam is weak enforcement of copyright law. See more at IIPA Reports from 2001-2014 at <www.iipa.com>.

¹⁷⁸ As justified above at page 43-44 of this thesis.

¹⁷⁹ This point will be justified in depth in Chapter Six of this thesis.

¹⁸⁰ This argument will be illustrated in Chapter Six of this thesis.

¹⁸¹ Bao Tran, *Major hindrances to higher education sector in Vietnam* (PhD thesis, 2009) 3-5 available at

<https://www.academia.edu/211693/Major_hindrances_to_Higher_Education_sector_in_Vietnam> (retrieved 02 June 2015). In the thesis, the author indicated that students in the higher education sector were consuming outdated textbooks, poor curriculum designs, and other material imported from Russia in 1980s due to insufficient funds. This was the main barrier to education improvement.

¹⁸² Thu Hang, 'Outdated libraries put damper on learning' (2013) *VietnamNews* (online) <<http://vietnamnews.vn/in-bai/201919/outdated-libraries-put-damper-on-learning-.html>> (retrieved 02 June 2015).

¹⁸³ Anh Tuyet, 'Improving the spread of scientific and technology knowledge for people in remote areas' (29/5/2015) *Hanoimoi Newspaper* (online) (translated from Vietnamese languages). <<http://hanoimoi.com.vn/Tin-tuc/Khoa-hoc/757788/nang-cao-vai-tro-pho-bien-kien-thuc-khoa-hoc-cong-nghe>> (retrieved 02 June 2015).

Hang complained that libraries ‘open every day just doing simple things, like lending books from limited resources, instead of providing comfortable and enjoyable spaces for students to study and read’.¹⁸⁴ This is true, because librarians are not allowed to provide various services for the public. For example, interlibrary transfer is impossible, so if a library patron cannot find a book in a library, he/she must go to another library.¹⁸⁵ This discourages the public from going to libraries. Moreover, the lack of educational material encoded for people with disabilities has become common in Vietnam,¹⁸⁶ as copyright protection pushes the price up, while limitations and exceptions to copyright are limited.¹⁸⁷ It is high time to conduct comprehensive research on how to construct a pragmatic set of limitations and exceptions to copyright in Vietnam that can improve the knowledge flow to the public.

Knowledge flow to the public is typically important for innovation, economic growth and human flourishing. Nowadays, the global economy has been dominated by two global drivers: the intensification of the globalisation process and intensive ongoing technological changes. This new era requires nations to have access to greater knowledge acquisition to improve their competitive positions amongst intensified global competition. Policies supporting knowledge creation and technological development are known as ‘innovation policies’, and policies supporting building up human capabilities are called ‘human development policies’. The promotion of innovation and human development in developing countries is becoming a fashionable subject. The increased interest in this subject stems from a recognition that promoting sustainable growth in the developing world should go along with the engine of social-economic development; that is, knowledge creation and diffusion.¹⁸⁸ Therefore, this study attempts to determine the best way to construct limitations and exceptions to copyright in order to facilitate knowledge diffusion or knowledge access. Doing so will foster innovation and development in Vietnam.

¹⁸⁴ Thu Hang, above note 182.

¹⁸⁵ Thu Hang, above note 182. In this article, the author said she often has to run between libraries to find a book she needs.

¹⁸⁶ Hanoi Disable Association, ‘The shortage of books for visually impaired people’ (2013) <http://dphanoi.org.vn/index.php?option=com_content&task=view&id=2718&Itemid=808> (retrieved 02 June 2015) (translated from Vietnamese language). The article stated that books for visually impaired people only satisfied 60% of the demand. Sexual educational and entertainment books for such people are extremely rare.

¹⁸⁷ This issue will be discussed in depth in Chapter Six of this thesis.

¹⁸⁸ ‘Knowledge and other intangible factors tend to replace capital and labour accumulation as source of growth’. See at Jean-Eric Aubert, above note 90 at 7.

In short, throughout the development of copyright law in Vietnam, it has been shown that its copyright protection has expanded over time in order to adjust to international standards. The subject matters have been extended. The protection period has been extended, and new rights have been added to the catalogue. The current copyright law is stronger than its predecessor. It has significantly tipped the balance in favour of copyright owners and not necessarily in favour of society at large. It is an ineffective way to solve current issues relating to high demand of access and rampant piracy. While strong protection is required to comply with international conventions, piracy reduction and support access for the public in Vietnam through the provision of copyright limitations and exceptions is needed.

2.5 CONCLUDING REMARKS

This chapter set out the context of the research: that Vietnamese copyright law is too restrictive to cope with the conditions and needs of the country. The chapter highlighted that Vietnam is a multicultural nation, influenced by both Eastern and Western lifestyles; hence, sharing knowledge is favoured. Moreover, after China's thousand year invasion, the Vietnamese people have shared some common values and ideologies with China's Confucianism: the love of learning and retrieving knowledge, the free reproduction of materials for education, and the respect of public interest. Moreover, as a socialist communist country, Vietnam's political and legal systems have been influenced by the Marxist philosophy, which always prioritises public interest over private ones. At the level of economic growth, Vietnam's economy is in the transition stage between developing and developed experienced by rapid growth; thus, it desires knowledge. In addition, the country is characterised as a net importer of cultural products, and one of the best locations for FDI. All of these factors show that Vietnam not only supports, but also urgently requires broad access for the public to cultural knowledge for its growth and human development. Its copyright law should support that direction: the copyright law system has to balance both rights or even slant towards the side of the public. However, its copyright law has been built based on increasingly strong international standards of copyright protection, so it is overly restrictive. Hence, its copyright law is imbalanced, weighted too much toward copyright protection for copyright owners and ignores public access. This improper system needs to be reformed by rethinking the role of

copyright limitations and exceptions toward enabling more public access for innovation and development.

Chapter 3: Copyright, Innovation, and Development

Knowledge is, in every country, the surest basic of public happiness

George Washington

3.1 OVERVIEW

This chapter is designed to address the fundamental matters that are the basis of this study: namely, the relationship between copyright and innovation and development. Grounded on the assumption that innovation and development is good for human beings, this chapter investigates an important factor that promotes innovation and development – access to knowledge – as knowledge is the root of innovation and development. The first section of the chapter demonstrates that existing knowledge is the primary input of innovation. Hence, innovators need access to expressions of knowledge for their activities. The second section concentrates on the importance of access to expressions of knowledge for development. The human development, or capabilities approach, is utilised as the main approach on development. This thesis argues that knowledge is a unique resource of human welfare. All citizens need access to expressions of knowledge to enhance their capabilities to live long, healthy, and happy lives.

After identifying the important role of access to knowledge for innovation and development, the third section of the chapter looks at the relationship between copyright law and access to knowledge. This thesis argues that scientific and cultural knowledge is often encoded into concrete forms; therefore, access to the expression of knowledge is typically important for innovation and development. Copyright protects the original expression of knowledge, so, on the one hand, it incentivises creative activities through knowledge privatisation, but on the other hand, it negatively impacts access to the expression of knowledge. Therefore, a balanced copyright system is needed for innovation and development. A balanced copyright system supports access to the expression of knowledge by balancing between the rights of the copyright owner, and limitations and exceptions to copyright (so-called ‘users’ rights’). This argument lays the foundation of the theory on the role of

copyright limitations and exceptions in promoting innovation and development: that is, that copyright limitations and exceptions, which are an essential part of keeping copyright in balance, open spaces for access to knowledge and can facilitate innovation and development.

3.2 ACCESS TO KNOWLEDGE FOR INNOVATION

Innovation plays an important role in economic development. It is a key determinant of economic growth. Innovation is created by the use of knowledge in new ways to create added value. Therefore, making knowledge available or creating access to knowledge is a must for economic growth, as innovation can be generated by promoting greater access to knowledge. This section first investigates the role of innovation on economic growth. It then examines the relationship between knowledge and innovation to show that knowledge begets innovation and that access to knowledge is necessary. This section connects to the main argument of the thesis that innovation needs access to knowledge, and access to knowledge is promoted by limitations and exceptions to copyright.

3.2.1 Innovation – a determinant of economic growth

Theories on economic growth have changed over time, depending on the economic environment of each stage of development. Initially, Classical Economics between the 18th and 19th century identified that capital accumulation was the most important determinant for a nation's development.¹⁸⁹ This ideology was compatible with the stage of the growth, as the level of technology was too low to impact on people's production.¹⁹⁰ Turning to the 20th century, when technological progress could shift the production frontier upward, Neoclassical Economics found that technology progress, rather than capital accumulation, was the determinant of

¹⁸⁹ Adam Smith, *The Wealth of Nations* (1776) 276-77. He stated that 'accumulation of capital feeds economic growth'. Adam Smith stated that real wealth of a nation is what money buys. It is what is known today as gross national product (GNP). Ricardo and Malthus insisted that the nation's wealth was determined by the size of capital, labour forces, land, and the level of technology. Out of these factors, capital accumulation was the most important factor for growth. This theory was suitable in the stage of colony expansion conducted by the British, French, and Spanish. Such countries tried to develop their colonies around the world to exploit the land and national resources for the purpose of capital accumulation. See more at Eamon Butler, *The Condensed Wealth of Nation and the Incredibly Condensed Theory of Moral Sentiment* (ASI research Ltd, 2011) 33.

¹⁹⁰ The shortcomings of this theory were exposed early in the middle of 19th century. It was dominated by agriculture, so it ignored the role of technical progress and was outdated in industrial economies. Furthermore, it failed to incorporate all of the complicated factors that affect economic growth, such as culture, civilisation, traditions, and knowledge. Mansell and Wehn, *Knowledge societies: Information technologies for sustainable development* (Oxford University Press, 1998) 8.

sustained growth.¹⁹¹ The recent decades have experienced the emergence of information technology and global trade, where intangible assets (knowledge, information, creativity, and inventiveness) have been rapidly replacing traditional and tangible assets (land, labour, and capital) and have been the driving forces of economic growth. The endogenous growth theory of Evolutionary Economics, built on the fundamental Schumpeterian ideas of creative destruction and innovation as the driving forces to economic development, have emerged as the best theoretical approach of economic growth.¹⁹²

Schumpeterian literature recognised that in the digital age, among components driven by economic growth, innovation is a determinant.¹⁹³ According to

¹⁹¹ The theory of Neoclassical Economics was established by Thorstein Veblen and developed by Robert Solow, a Nobel Prize winner in 1994. Solow stated that a sustained increase in capital investment increases the growth rate only temporarily, because the ratio of capital to labour goes up, but the marginal product of additional units of capital is assumed to decline; and thus, an economy ultimately moves back to a long-term growth path, with real GDP growing at the same rate as the growth of the workforce, plus a factor to reflect improving productivity. Solow showed that the growth rate is independent of the investment rate (capital accumulation) and countries can achieve a one-time increase of their GDP by increasing their saving rates (capital accumulation), but the economy cannot enjoy continuous growth. He pointed out that ‘the economy would automatically move back to the equilibrium point, and would stay there unless something pushed the mode off equilibrium’. He then concluded that technological progress is the determinant of sustained growth, because it could shift the production frontier upward. This theory has been challenged recently, as high-tech fields emerged. In addition, this approach does not emphasise the role of human resources or the role of knowledge, while the rapid change of high-technology industries in recent times has required firms to focus more on such factors in order to spur innovation. Moreover, they view technologies as an exogenous factor, whereas many firms have in fact invested in new technologies when they see opportunities to earn profit. Additionally, this approach is based on the competitive market, but in the world of innovations, new technologies and the spillover of R&D investment effects, numerous forms of non-competitive market structures have occurred over recent decades. The products of Apple and Microsoft are good examples of a non-competitive role of technology advances or knowledge growth in the economic growth. See more at Tony Aspromourgos, ‘On the origins of the term ‘neoclassical’ (1986) 10 (3) *Cambridge Journal of Economic* 265; David Colander, ‘The Death of Neoclassical Economics’ (2000) 22 (2) *Journal of the History of Economic Thought* 127.

¹⁹² Gene M Grossman and Elhanan Helpman, *Innovation and growth in the global economy* (MIT Press, 1991); Kamil Idris, above note 27 at 8.

¹⁹³ Economic growth as the development of economic systems is a new paradigm developed in the last two decades. This theory is based on the outcome of an organic process of Darwinian natural selection. In the Darwinian model the central concepts are organisms, populations, fitness, genes, and mutations. Similarly, evolutionary economists link that individual firms are organisms, industries are populations, profitability is fitness, routines are genes, and innovations are mutations. This theory, thus, contains three important aspects. Firstly, it emphasises dynamic capability and core competence as the basic forces of economic change. In other words, it emphasises endogenous growth, dynamic capability, and adaptive efficiency, rather than the superior role of the competitive market as an external force. Secondly, the invention of knowledge ‘innovation’ plays an active role in creating new combinations in the production and marketing process. Thirdly, the generic theory of evolution, where the principle of survival of the fittest is applied to explain industry growth, is applied to explain economic activities. In particular, this approach explains why dynamic force changes technology and innovation, and it leads to the competition between firms in new innovations. Successful firms transform their innovations in order to create new products and processes with increasing profits. Such firms enjoy their temporary monopoly to harvest huge profits until other firms catch up. It is different from previous economic theories, which explained the competition of firms only based on prices and

Schumpeterian literature, the process of economic development can be divided into three separate stages. The first stage is the technical discovery of new things or new ways of doing things, which Schumpeter referred to as ‘invention’. The second step is innovation – the successful commercialisation of new goods or services stemming from technical discoveries. The final stage is imitation, which is the general adoption or diffusion of new products or process to markets.¹⁹⁴

Innovation is the driving force of economic development.¹⁹⁵ Innovation is ‘simply doing new things, or doing of things that are already being done in a new way’.¹⁹⁶ Schumpeter attempted to distinguish between innovation and invention. He said invention was the production of new ideas, while innovation was the introduction of change via something new.¹⁹⁷ Hence, ‘the inventor produces ideas, the entrepreneur gets things done, which may not embody anything that is significantly new’.¹⁹⁸ Innovation may not even require the creation of new knowledge; it requires only the application of knowledge to create additional value. Innovation is the use of knowledge within businesses to find new ways to create and bring about change for the better. It includes not only new products or processes, but also new business processes or new ways of carrying out productive activities.¹⁹⁹

Schumpeter stated that ‘invention is a breakthrough in the world of knowledge, whereas innovation is that in the world of economy’.²⁰⁰ The major actor in

costs. For the last two decades the rapid economic growth of nations, especially of newly developed countries such as China, Taiwan, and South Korea, is proof of economic evolution rooted in openness in international trade and the fast adoption and development of new technology or innovations. Advances in high-tech fields of technology, which require high levels of intensive knowledge, such as computers, software, and communication technologies, and pharmaceuticals are endogenous dynamic forces of this high growth. Evolutionary economics is affirmed to be the modern approach, which is suitable for the new emerging economy. This is because it emphasises the role of innovation as endogenous growth, rather than the role of a competitive market as an external force. Furthermore, evolutionary economists believe that investments in knowledge capital or the spillover of R&D play a crucial role in development. See more at Richard R Nelson and Sidney G Winter, *An Evolutionary Theory of Economic Change* (Cambridge University Press, 1982); ^J Sengupta, ‘Evolutionary Economics’ in *Understanding Economic Growth: Modern Theory and Experience* (Springer Science and Business Media, 2011) 69.

¹⁹⁴ Pontus Braunerhjelm and Roger Svensson, ‘The inventor’s role: was Schumpeter right?’ (2010) 20 *Journal of Evolutionary Economics* 413, 414.

¹⁹⁵ Yagi, above note 13 at 204; Alcouffe and Kuhn, above note 13 at 226; Delong, above note 13 at B9; Prendergast, above note 13 at 257.

¹⁹⁶ Schumpeter, above note 12 at 152. See more about the concept of innovation in the terminology section in Chapter 1 of this thesis.

¹⁹⁷ Schumpeter, above note 12 at 152.

¹⁹⁸ Ibid

¹⁹⁹ See Section 1.6 ‘Terminology’ of Chapter One.

²⁰⁰ Schumpeter, above note 12 at 152.

Schumpeter's model is the entrepreneur²⁰¹, through his willingness to take risks and try new ideas in the hope of profit the entrepreneur unleashes the force of creative destruction. New technologies, new products, and new types of organisations compete against old ones, and the less successful collapse.²⁰² Moreover, competition is fundamentally dynamic; that is, the dynamic of the entrepreneur in searching for profits. Due to profits, entrepreneurs attempt to destroy old equilibria by establishing new combinations.²⁰³

Evolutionary Economics emphasises dynamic competition as a 'disequilibrating evolutionary process'²⁰⁴ that contains instant struggles between firms for comparative advantage over time in the industrial markets. Such struggles rise through two important forces. Firstly, the dynamic of profits leads to the investment in innovation to create further innovations, so that it enhances the growth of industry and the economy as a whole. Secondly, creative destruction dominates and drives economic growth, because it creates the economic structure of industry development. It is because each innovator of a new innovation is assumed to have temporary monopoly power that they earn huge profits until being replaced by the next innovator.²⁰⁵ New technologies, new products, new types of organisations compete against old ones, and the less successful collapse.²⁰⁶ Due to profit, the entrepreneur attempts to destroy old equilibria by establishing new combinations.²⁰⁷ Hence, policies from developed countries, such as the OECD²⁰⁸ and Australia's policy,²⁰⁹ highlight that innovation is a major source of growth.

Leveraging innovation for economic growth has been commonly recognised as an important policy in developing countries in the knowledge-driven economy, as it enables such nations to reduce poverty and promote their productivity and

²⁰¹ Schumpeter, above note 12 at 52.

²⁰² Schumpeter, above note 12 at 153.

²⁰³ Sengupta, above note 193 at 72.

²⁰⁴ Sengupta, above note 193 at 73.

²⁰⁵ Sengupta, above note 193 at 73; Alcouffe and Kuhn, above note 13 at 229.

²⁰⁶ Schumpeter, above note 12 at 52.

²⁰⁷ Sengupta, above note 193 at 229.

²⁰⁸ OECD, 'The OECD Innovation Strategy: Getting a Head Start on Tomorrow' (OECD, 2010).

²⁰⁹ Cutler and Company, 'Venturous Australia: Building Strength in Innovation: Review of the National Innovation System' Final Report (2008); Department of Innovation, Industry, Science and Research, 'Powering Ideas: an innovation agenda for the 21 century' the Government's response (2009) <<http://www.innovation.gov.au/Innovation/Policy/Documents/PoweringIdeas.pdf>> (retrieved 16 July 2012); Department for Broadband, Communications and the Digital Economy, 'Australia's Digital Economy: Future Directions' (2009) 11-12 <http://www.dbcde.gov.au/_data/assets/pdf_file/0006/117681/DIGITAL_ECONOMY_FUTURE DIRECTIONS_FINAL_REPORT.pdf> (retrieved 16 July 2012).

competitiveness. Developing countries are characterised by predominantly small and medium enterprises, which lack market information, risk tolerance, and financial resources,²¹⁰ so the willingness to engage in innovative activities is quite low.²¹¹ Moreover, the growth of developing countries depends strongly on the export of manufactures and commodities into world markets. Since the early 1990s, there has been an emergence of a new global knowledge economy, where knowledge has become the core of the country's comparative advantage. Moreover, the proportion of knowledge-based products in international trade has increased sharply.²¹² Such movements have raised concern in developing countries regarding the necessity of policy adjustment towards innovation in order to enhance their competitiveness and strengthen productivity. As stated above, innovation to improve economic growth should not be understood simply as invention, but also the first application of a product or process in a specific setting. Adopting innovation policy does not mean only boosting invention in those countries, but also acquiring knowledge and technology from abroad for local use and the adaption of knowledge into local conditions. Indeed, developing nations have been behind developed nations in terms of technological knowledge in most sectors, preventing the promotion of invention from being a priority. Boosting innovation in developing countries requires the acquisition of knowledge and the adaptation of knowledge from overseas into local firms, as well as the dissemination and effective application of knowledge and technology that is already available in country.²¹³ Innovation policies in developing countries are illustrated by strategies to stimulate the transfer of knowledge and technology (through FDI or trade) and the investment in research and development (R&D). China,²¹⁴ Taiwan,²¹⁵ Brazil,²¹⁶ India, Singapore, South Korea, and

²¹⁰ Chia-Yi Chen, Yu-Ling Lin and Po-Young Chu, 'Facilitators of national innovation in a SME-dominated country: A case study of Taiwan' in *Innovation: Management, Policy and Practice* (Routledge, 2014) 405, 407.

²¹¹ OECD, 1988.

²¹² The proportion of high technology goods in international trade rose from 33 per cent in 1973 to 60 per cent in 2007. See more at OECD iLibrary, 'International trade by technology intensity' (2009) available at

<http://www.oecd-ilibrary.org/sites/sti_scoreboard-2009-en/03/02/index.html?contentType=&itemId=%2Fcontent%2Fchapter%2Fsti_scoreboard-2009-34-en&mimeType=text%2Fhtml&containerItemId=%2Fcontent%2Fserial%2F20725345&accessItemIds=%2Fcontent%2Fbook%2Fsti_scoreboard-2009-en> (retrieved 27 January 2015).

²¹³ Rodriguez and Dahlman and Salmi, above note 63 at 23.

²¹⁴ Yanrui Wu, 'Innovation and Economic Growth in China' (Discussion Paper No 10.10, The University of Western Australia, 2009) 3.

²¹⁵ Kuen-Hung Tsai and Jiann-Chyuan Wang 'An Examination of Taiwan's Innovation Policies and R&D Performance' (Chung-Hua Institution for Economic Research, 2002) available at

Thailand²¹⁷ are just a few of the many examples where national innovation policies have been implemented successfully.²¹⁸

3.2.2 Knowledge access is important for innovation

Access to knowledge is essential for innovation and economic development, as knowledge is a specific input of innovation. It is generally assumed that the process of innovation consists of an ongoing pursuit of harnessing new and unique knowledge.²¹⁹ This is because innovation is a process or product always produced by firms or entrepreneurs. Innovation is broadly viewed as ‘a process that has important implications, with regard to the use of knowledge within the theory of firms’.²²⁰ Firms’ future technological possibilities are heavily dependent on their past technological capabilities.²²¹ In these routines, essential coordination information is stored and ‘remembered by doing’; thus, the routines rely on individual knowledge, and ‘also, much of the knowledge that underlines the effective performance is tacit knowledge of the organisation, not consciously known or articulable by anyone in particular’.²²² That is, innovations are generated on the basis of existing products, processes, and technical knowledge. Marshall explicitly noted the connection between knowledge and innovation within the firm as if knowledge is ‘the gene of innovation’.²²³

Furthermore, the diffusion of knowledge strongly impacts on the rate of innovation, as innovative creativity does not occur in a vacuum,²²⁴ it must lean on

<http://www.cid.harvard.edu/archive/biotech/events/sti_conf/Wang120902.pdf> (retrieved on 18 January 2015) 2; Chia-Yi Chen, Yu-Ling Lin and Po-Young Chu, above note 209 at 405-415.

²¹⁶ Rodriguez and Dahlman and Salmi, above note 63 at 28.

²¹⁷ Lakhwinder Singh, ‘Innovation and Economic Growth in a Fast Changing Global Economy: Comparative Experience of South East Asian Countries’ (Paper presented at Korea and the World Economy V, Korea University, 7-8 July 2006) 4.

²¹⁸ For the last two decades, rapid economic growth of nations such as China, Taiwan, and South Korea is proof of economic growth rooted in openness in international trade and fast adoption and development of new technological innovation. Evolutionary economics is affirmed to be the modern approach suitable for emerging economics, as it emphasises the role of innovation as endogenous growth, rather than the role of a competitive market as an external force. See more at Sengupta, above note 193 at 69.

²¹⁹ M Subramaniam, and M A Youndt, (2005), “The influence of intellectual capital on the types of innovative capabilities” 48 (3) *Academy of Management Journal* 450, 460.

²²⁰ M Quere, ‘Knowledge and Innovation: promoting a system approach of innovation processes’ (2008) 17 (1-2) *Economics of Innovation and New Technology* 137, 144.

²²¹ Giovanni Dosi, ‘The nature of innovative process’ In Giovanni Dosi et al, ed., *Technical Changes and Economic Theory* (Columbia University Press, 1988) 221, 225.

²²² Nelson and Winter, above note 193 at 134.

²²³ A Marshall, *Principles of Economics* (Macmillan and Co., 8th ed, 1920) 18.

²²⁴ Nicolas Suzor, ‘Access, Progress, and Fairness: Rethinking Exclusivity in Copyright’ (2013) 15 (2) *Vanderbilt Journal of Entertainment and Technology Law* 297, 318; Amy L Landers, ‘Ordinary

previous innovations. As Wendell Phillips said, ‘take the whole range of imaginative literature, and we are all wholesale borrowers. In every matter that relates to invention, to use, or beauty, or form, we are borrowers’.²²⁵ The rate of knowledge diffusion directly impacts on the rate of use and reuse of knowledge by the population and determines the capability of extracting useful knowledge to generate new innovative products. This is illustrated by innovative expressions that are subject matters of copyright. In creating a cultural work, a potential author firstly needs to obtain sufficient knowledge in a particular field through reading, watching, listening, or hearing existing works and he/she then fixes existing knowledge in a creative way into a type of medium of expression. Hence, the quicker and more broadly the author acquires knowledge, the sooner he/she generates his/her work. For example, the creation of the Harry Potter novel series not only resulted from the genius imagination of J K Rowling, but also stemmed from the long tradition of the Scottish literary excellence, in addition to accumulated cultural knowledge of global human beings. Rowling successfully used existing human knowledge created by a number of previous renowned creators such as Nancy Kathleen Stouffer,²²⁶ the Wyrd Sisters,²²⁷ Adrian Jacobs,²²⁸ Sir Walter Scott, and numerous other children’s fairy tales into her novels. The number of legal disputes that Rowling was involved in after releasing her novels provides good evidence for the fact that Rowling creatively reused previous knowledge of human beings contained in previous expressions.

Creativity in Patent Law: The Artist Within the Scientist’ (2010) 75 (1) *Missouri Law Review* 59, 60; L Ray Patterson and Stanley W Lindberg, *The nature of copyright: A Law of users’ right* (University of Georgia Press, 1991) 53.

²²⁵ Wendell Phillip quoted in Lyman Ray Patterson and Stanley W Lindberg, above note 224; Sacvan Bercovitch (eds), *The Cambridge History of American Literature – Volume Five: Poetry and Criticism 1990-1950* (Cambridge University Press, 2003) 356.

²²⁶ In 1999, American author Nancy Kathleen Stouffer sued Rowling for copyright infringement of her work *The Legend of Rah and the Muggles*, a children’s fairy tale published in 1985. The character Harry Potter of Rowling is allegedly like the little dark-haired boy Larry Potter of Stouffer. Stouffer also sued Rowling for copying other expressions in her book. Although the court was in favour of Rowling, it seems that Rowling absorbed Stouffer’s work at some points. See more at *Scholastic Inc. v. Stouffer* 221 F. Supp. 2d 425 (S.D.N.Y.2002).

²²⁷ The Canadian folk band the Wyrd Sisters sued Rowling for a scene in the novel in which a band called the Wird Sisters appeared at a school dance. This lawsuit was settled by the court in 2010 with a sealed settlement. See more at Steve Lambert, ‘Wyrd five-year court battle over Harry Potter movie ends with secret settlement’ (28 March 2010) *The Canadian Press* 20.

²²⁸ In 2009, the descendant of Adrian Jacobs, a children’s author who died in 1997, sued Rowling for copyright infringement for reproducing substantial parts of Jacobs’ works. Rowling was alleged to copy Jacobs’s book *The Adventures of Willy Wizard* into her work *Harry Potter and the Goblet of Fire*. The US court dismissed the lawsuit against Rowling and her publisher for not enough similarity between two books. See more at Lesley Ciarula Taylor, ‘J K Rowling sued for plagiarism’ (18 February 2010) *Toronto Star*; Karen Sloan, ‘It is Harry Potter and the Allegation of Plagiarism?’ (15 July 2010) *The National Law Journal* 30.

Similarly, the case of the popular Flappy Bird game, created by a Vietnamese man, Dong Nguyen,²²⁹ is a good example for the inheritance of knowledge. This game creatively uses images of pipes and coin sound effects from a game called Piou Piou created in 2011.²³⁰ Moreover, the Flappy Bird game was written by using software called the Open Source Software Android, which was written, developed and shared by millions of users. More broadly, Joel Mokyr identified the spread of useful knowledge that accompanied the Enlightenment as a direct enabler of the Industrial Revolution.²³¹ During this age, the wide spread of useful knowledge around the world enabled rapid technology innovation.²³² Mokyr²³³ and Benkler²³⁴ posited that the competence of acquiring access to knowledge determines how quickly improvement in knowledge translates into innovation.

Economic growth via constant innovation is explained as the change of rules or the growth of knowledge. Metcalfe says ‘all economies are knowledge based and could not be otherwise’.²³⁵ Therefore, ‘Economies can grow because knowledge can grow. The locus of the wealth of nations is the human mind and its propensity to originate, adopts, and retains new ideas [new knowledge accumulated into innovations]’.²³⁶ Agents in question, referred to as Homo Sapiens Economics, are carriers who use rules for operations and also originate, adopt, and retain novel generic rules (innovations).²³⁷ A Homo Sapien is a smart man who not only can make and use tools as an animal, but also make and use animal rules to make generic change. Therefore, Homo Sapiens are chosen as ‘a generic carriers of rules [existing innovation] and are capable of originating, adopting, and retaining new knowledge, and so of becoming different [new innovation]’.²³⁸ Logically, economic growth

²²⁹ This game was the top downloaded game in the Android store in 2014, and was then removed by the author because of his fear that it became an addictive product. See more at Element Behavioural Health, ‘Flappy Bird “Too Addictive” Creator Says’ available at <http://www.elementsbehavioralhealth.com/behavioral-process-addictions/flappy-bird-too-addictive-creator-says/> (retrieved 27 January 2015).

²³⁰ See Sean Kaufhould, ‘The legal issues standing in the way of a Flappy Bird return’ (2014) <http://southdakotapatent.com/patent-blog/the-legal-issues-standing-in-the-way-of-a-flappy-bird-return/> (retrieved 27 January 2015).

²³¹ Joel Mokyr, *The Gifts of Athena: Historical Origins of the Knowledge Economy* (Princeton University Press, 2011) 25-28.

²³² Ibid.

²³³ Ibid.

²³⁴ Benkler, above note 25 at 35-58.

²³⁵ Metcalfe, above note 23 at 176.

²³⁶ Ibid.

²³⁷ Ibid.

²³⁸ Ibid at 179.

begins with a novel idea (innovation) in a single agent (innovator) and is then adopted and retained by other agents (a population of carriers) so as to form a stable rule (stable innovation).²³⁹ This stable rule in turn is improved by new rules (new innovation) to progress the existing rule. This means that there are two prerequisites in order to have economic growth: a new idea (knowledge hindered inside an innovation) and the dissemination of that idea (the diffusion of knowledge) to the public. Without one of them, economic growth cannot happen.

3.2.3 Knowledge access is particularly important for decentralised innovation in the digital age

The digital age has created chances for everyone involved in creative activities, and this has led to the era of decentralised innovation, where not only industrial fields can provide innovation but also consumers. In the traditional culture of the centralised era, users or consumers passively consumed innovative products without shaping and controlling them.²⁴⁰ Innovation was centred merely within the engineering environment or within firms.²⁴¹ In contrast, decentralised innovation is characterised by the fact that the main source of innovation is customers, the internet community, and, at the end, the research teams with industries.²⁴² Decentralised innovation has emerged as a new era of innovation, which increases the rates of innovation. For example, a series of recent changes in digital technologies created new opportunities for individuals to take more active roles in creativity than was possible in the past. The global spread of the internet, digital cable TV, 3G networks for mobile phones, and cheap digital creation devices (such as digital cameras, laptops, iPods, audio-visual recordings) empowers the users' capability to engage in creative activities such as modifying, remixing, and manipulating the cultural objects they have received. Web 2.0 applications such as blogs, podcasts, wikis, or video sharing enable users to easily share their work and to play a more active role in

²³⁹ Ibid at 185.

²⁴⁰ Henry Jenkins et al., above note 47 at vi; John D And Catherine T MacArthur, Foundation Reports on Digital Media and Learning (2007) <http://digitalllearning.macfound.org/atf/cf/%7B7E45C7E0-A3E0-4B89-AC9C-E807E1B0AE4E%7D/JENKINS_WHITE_PAPER.PDF>.

²⁴¹ Florence Le Borgne-Bachschmidt et al, 'User-Created – Content: Supporting a participated Information Society', Final report of IDATE Consulting and Research (2007- 2008) 29 <http://ec.europa.eu/information_society/eeurope/i2010/docs/studies/ucc-final_report.pdf>.

²⁴² Dariusz Kralewski, 'Bottom-up decentralized approach to innovation strategy' (Working paper, University of Gdansk, Poland) available at <http://ceur-ws.org/Vol-864/paper_7.pdf> (retrieved 27 January 2015).

content creation and knowledge distribution.²⁴³ This has resulted in the dramatic increase of user's participation into creating content,²⁴⁴ leading to the sharp increase of user innovation. Consumers do not passively but rather actively consume finished products by modifying and integrating pre-existing innovation to suit their own needs. According to Nesta's survey, 8% of all respondents engaged in user innovation at the consumer level by modifying or creating products and software, and it was estimated that potentially over 3 million consumers in the UK had been engaging in innovative activities. At the firm level, it was recorded that 10.3% of the total respondents engaged in innovation. In Canada and the Netherlands, user-generated content is estimated to be 40% and 54% respectively.²⁴⁵ User innovators or user-created content frequently involves modification and creation of both cultural goods and equipment. Regarding cultural goods, digital mashups in which users combine audio, video, pictures, or textual materials of pre-existing works to create new works are popular today. For instance, *The Grey Album* created in 2004 by Brian Burton was integrated from the Beatles', *The White Album*.²⁴⁶ After that, *The Grey Album* was remixed by some users into a video recording, *The Grey Video*, and publicly posted on social networks such as YouTube, DailyMotion, and Waxy.²⁴⁷ In

²⁴³ Commission of the European Communities, 'Green Paper: Copyright in the Knowledge Economy' COM (2008) 466/3 <http://ec.europa.eu/internal_market/copyright/docs/copyright-info/greenpaper_en.pdf> (retrieved 29 March 2015).

²⁴⁴ It is recorded by the User-Creative-Content (UCC) research that 70% of total global internet users have read blogs or social networks, 35.2% of total global internet users have written a blog. This study provided an amazing amount of content created by users. For example, up to August 2008, YouTube stored 80 million videos and approximately 13 hours of videos were uploaded every minute. Nearly 100 million videos in YouTube are user-created. Around 15,000 videos are uploaded daily on DailyMotion. More than 5 billion images and videos are stored by Photobucket and 10 million new images are uploaded daily. Up to April 2008, Wikipedia consisted of over 10 million articles, in 253 languages, of over 75,000 active voluntary contributors. According to the Pew Internet and American Life project more than 50% of teenagers have created media content and approximately 33% of them use the internet to share content they produce. In the case of Vietnam, the involvement of user-created content is approximately 38% of all internet users. See more at Jean Burgess and Joshua Green, *YouTube: Online Video and Participatory Culture* (John Hartley, 2009) 43; Amanda Lenhart and Mary Madden, 'Teen Content Creators and Consumers', Pew Internet and American Life Project (2005) <http://www.pewinternet.org/PDF/r/166/report_display.asp> (retrieved 20 September 2012); Cimogo Report, '2011 Vietnam NetCitizens Report: Internet Usage and Development in Vietnam' (2011) 18 <<http://cimigo.vn/en-us/ReportDetail.aspx?ProductId=234>> (retrieved 20 September 2012).

²⁴⁵ Jean Burgess and Joshua Green, above note 244 at 15-19. In this research, user innovators are sorted in two types based on the source of innovators. Innovative users at the consumer level are users who modify products to address their personal needs, and user innovators at the firm level work for the firm and alter goods or solutions to address specific needs of the firm. Conversely, William W Fisher classified user innovation into two categories on the basis of the source of innovations: innovation of cultural goods and innovation of equipment. See more at Fisher, above note 35 at 1418.

²⁴⁶ *The Grey Album or Danger Mouse* (2004). It is discussed by Fisher, above note 35 at 1418..

²⁴⁷ *The Grey Video* <http://waxy.org/random/video/grey_video.mov> (retrieved 20 September 2012) cited by Fisher, above note 35 at 1419.

addition, many amateurs edit released movies by removing scenes or characters to make them humorous, or fan fiction writers create stories using characters from popular works to share on internet communities. Quite commonly, game players modify computer games, or create new games so that such games become more exciting or complicated. Game manufactures even encourage them to do so by providing them with ‘toolkits’.²⁴⁸ An example of this is the application of Open-Source Software. It was generated from an information technology expert, Linus, who initially created the computer software operating system named Linus Torvalds. Unlike the commercial software of Microsoft or Apple, Open-Source Software is made available for free with its source code and allows users to modify or create new works as long as they share improvements and modifications with the broader community. At present, Open-Source Software has been developed by millions of volunteers worldwide via the internet and widely applied in a variety of platforms, including tablet PCs, mobile phones, and video games consoles.²⁴⁹ Furthermore, modifications or creations of windsurfers, snowboarders, kayakers, sports people, or mobile phone users who add more functions or make mass products more effective, flexible, or convenient are also product user innovations.

The emergence of user innovations, referred to a prosumer or pro-ams,²⁵⁰ is obviously good for economic growth. It brings a huge amount of innovation for the economy; hence, promoting innovation should shift from the incentive of innovation within the industrial sector to the public. As mentioned above, innovation can appear not only within these enterprises, but also among users (consumers), and has created more value for the economy. Although most user-created content activity has been ‘undertaken without the expectation of profit’,²⁵¹ the spread of user-created content is a significantly disruptive force for how content is created and consumed, which

²⁴⁸ Fisher, above note 35 at.1418.

²⁴⁹ S Weber, *The success of Open Source* (The Grey Album or Danger Mouse, 2004). It is discussed by Fisher, above note 35 at.

²⁵⁰ Prosumer = producer + consumer; pro-am = professional + amateurs. Such concepts were mentioned by Gerhard Fischer, ‘Cultures of Participation: Opportunities and Challenges for the Future of Digital Libraries’ Center for Lifelong Learning and Design (2009) <<http://www.jcdl2009.org/files/gerhard-slides-jcdl-final.pdf>> (retrieved 20 September 2012); Xiaoxiang Shi, ‘Towards a theory of copyright law: reconfiguring author’s economic rights to facilitate knowledge growth in networked information societies’ 27 (PhD Thesis, 2010); Fisher, above note 35.

²⁵¹ OECD, ‘Working Party on the Information Economy - Participative Web: user-Created Content’ DSTI/ICCP/IE(2006)/FINAL (12 April 2007) 4 <<http://www.oecd.org/sti/38393115.pdf>> (retrieved 20 September 2012).

pushes content suppliers to improve the quality of their products. Moreover, due to the emergence of user innovation, traditional content suppliers have to shift their strategies toward new value added models. Additionally, new forms of business models that support user creation and distribution have been established. For example, in the field of publication and broadcast, publishers and broadcasters have shifted from merely one way distribution of content to interactive content diffusion, so that users can make comments, rate, and publish.²⁵² Furthermore, new forms of business models that support user innovation have flourished with tremendous revenue. YouTube,²⁵³ Google,²⁵⁴ Yahoo,²⁵⁵ Facebook,²⁵⁶ and Wikipedia²⁵⁷ are a few of the numerous examples of new business models that developed successful services based on decentralised innovation. Furthermore, traditional business models have started to face competition from freely provided amateur-created content. This has recently been obvious in the fields of photography, design, and journalism, where photographers, journalists, designers, and others are now competing with freely available web content.

In promoting decentralised innovation in the digital age, securing access to knowledge for the public is more necessary than ever before as innovation requires knowledge to be widely available so that everyone is able to access or use to create his/her own innovation. Digital technologies such as creative tools and search engines have created opportunities for users to actively take part in innovative activities. Digital platforms such as blogs, wikis, social networking sites, and other distribution websites have also created more possibilities for users to learn, build up

²⁵² Ibid at 5.

²⁵³ YouTube's revenue was \$810 million in 2013 and \$1.13 billion in 2014. See more at Todd Spangler, 'YouTube US Video-Ad Revenue will top \$1 billion in 2014: Report' *Variety* (online) 11 September 2014 <<http://variety.com/2014/digital/news/youtube-u-s-video-ad-revenue-will-top-1-billion-in-2014-report-1201303523/>> (retrieved 29 March 2015).

²⁵⁴ Google reported 20% year-on-year growth in revenues to \$16.52 billion. See Trefis Team, 'Google Earnings: Profitability Disappoints Even As Revenue Grows' *Forbes* (online) 20 October 2014 <<http://www.forbes.com/sites/greatspeculations/2014/10/20/google-earnings-profitability-disappoints-even-as-revenue-grows/>> (retrieved 29 March 2014).

²⁵⁵ In the second quarter of 2014, Yahoo earned USD\$1.05 billion. See Statista, 'Revenue of Yahoo from 1st quarter 2007 to 4th quarter 2014 (in million U.S. dollars) (2015)' <<http://www.statista.com/statistics/266266/quarterly-revenue-of-yahoo/>> (retrieved 29 March 2015).

²⁵⁶ Facebook earned USD\$10 billion in 2014. See Seth Fiegerman, 'Facebook's annual revenue topped \$10 billion for the first time in 2014' *Mashable Australia* (online) 29 January 2015 <<http://mashable.com/2015/01/28/facebook-q4-earnings-2014/>> (retrieved 29 March 2015).

²⁵⁷ It was calculated that Wikipedia made USD\$2.3 billion per year. See Michael Johnston, 'Wikipedia Revenue Analysis: How a Wiki Could make 2.8 B a year' MonetizePros (online) 25 June 2013 <<http://monetizepros.com/blog/2013/analysis-how-wikipedia-could-make-2-8-billion-in-annual-revenue/>> (retrieved 29 March 2015).

their ideas, collaborate with others, and share their innovations. However, the main source users need for their innovative activities is knowledge content. For example, in order to create music mash-ups, an amateur requires access to existing songs. No access means no further creation. Therefore, decentralised innovation requires knowledge acquisition in the public.

In summary, this section has shown that as a determinant of economic growth, promoting innovation is a must. In promoting innovation, access to knowledge is significantly important, as knowledge is a typical input of innovation. Access to knowledge is increasingly important in the digital era, where innovation is decentralised within the community. This position is connected to the overall thesis argument that limitations and exceptions to copyright facilitate access to knowledge, thus incentivising innovation.

3.3 THE IMPORTANCE OF ACCESS TO KNOWLEDGE FOR DEVELOPMENT

Access to knowledge is crucial for human development, as it ensures all human beings can enjoy central capabilities such as long lives, health, senses, emotions, imagination, political participation, and freedom. This section examines in detail the role of access to knowledge for human development grounded in the capabilities approach, or human development theory, articulated by Amartya Sen.²⁵⁸ The section corresponds with the overarching argument of the thesis by virtue of access to knowledge being vital for human development, and limitations and exceptions to copyright playing the typical role in facilitating it.

3.3.1 Introduction of the human development paradigm

Since 1990, after the United Nations Development Programme (UNDP) launched its first Human Development Report,²⁵⁹ the mainstream thought on development has focussed on the theory of human capabilities, known as ‘capabilities approaches’ or ‘human development’, articulated by Amartya Sen and developed by a number of leading philosophers such as Martha C Nussbaum, Sabina Alkire, Anthony Atkinson, Mahbub ul-Haq and Severine Deneulin. Currently, development is understandably more than GDP growth, more than income or wealth. It is a process of ‘enlarging people’s choices in order to live a long and healthy life,

²⁵⁸ Above note 12.

²⁵⁹ UNDP, above note 90.

to be educated, and to have access to the resources needed for a decent standard of living'.²⁶⁰ Human development is the process that creates a 'conducive environment for its citizens to develop their capabilities'.²⁶¹ Development, Sen said, should be evaluated in terms of 'the expansion of the capabilities of people to lead the kind of lives they value and have reason to value'.²⁶²

What are capabilities? Sen and his colleagues posited that this is 'the term of what is this person able to do and to be?'.²⁶³ Sen defined capability as 'a person's ability to do valuable acts or reach valuable states of being'.²⁶⁴ He considered freedom to be one of the most basic elements of human development. Capability, thus, is a kind of freedom.²⁶⁵ He stated that 'the freedoms of individuals as the basic building blocks of development'²⁶⁶ and 'assessment of progress has to be done primarily in terms of whether the freedoms that people have are enhanced'.²⁶⁷ According to Sen, a society is more developed when its individual members have benefits from a greater freedom to achieve what is constituted as their well-being.²⁶⁸ Alkire clarifies that the objective of expanding the freedom of people is to enjoy 'valuable doings and beings'.²⁶⁹ Therefore, the role of government is to create and maintain social conditions that best enable people's freedom to have reason to choose and value.²⁷⁰

Based on Sen's argument about the importance of freedom for human beings, Nussbaum goes further by establishing a list of 10 central capabilities to satisfy central human functioning: life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation; other species; play; and control over one's environment.²⁷¹ Each of the central capabilities is equally important for human life, as 'delivery of these ten capabilities to all citizens is a necessary

²⁶⁰ Ibid.

²⁶¹ Ibid.

²⁶² Sen, above note 17 at 58.

²⁶³ Sen, above note 17; Nussbaum, above note 19 at 20; Severine Deneulin, *The Capability Approach and the Praxis of Development* (Palgrave Macmillan, 2006) 4.

²⁶⁴ Amartya Sen, 'Capability and Well-Being' in Martha C Nussbaum and Amartya Sen (eds) *The Quality of Life* (Oxford University Press, 1993) 30-53.

²⁶⁵ Nussbaum, above note 19 at 20.

²⁶⁶ Sen, above note 17 at 18.

²⁶⁷ Sen, above note 17 at 4.

²⁶⁸ Sen, above note 17 at xii.

²⁶⁹ Sabina Alkire, 'Why the Capability Approach' (2005) 6(1) *Journal of Human Development* 115, 117.

²⁷⁰ S Wall, *Liberalism, Perfectionism and Restraint* (Cambridge University Press, 1980) 8.

²⁷¹ Nussbaum, above note 19 at 33-35.

condition of social justice.’²⁷² ‘All are distinctive, and all need to be secured and protected in distinctive ways’.²⁷³ Nussbaum asserted that a society must ‘secure to all citizens at least a threshold level of these ten central capabilities’.²⁷⁴ Central capabilities require development not only to be successful in building an economy, but also to enable lifestyles to flourish. It ensures that all human beings have long lives with good health, are adequately nourished, have adequate shelter, free movement, and are secure against violent assault. Additionally, it allows people to use their senses, to imagine, think, and reason, and to do these things in a ‘truly human’ way. In order to do that, all people must be literate, numerate, and adequately educated. Moreover, a decent society must provide people with the capability to live with love, experience grief, longing, gratitude, and justified anger. People are also able to laugh, play, and enjoy recreational activities. Furthermore, they are able to work, engage in various form of social interaction, participate effectively in political participation, be able to be treated equally, have freedom of expression, and have freedom of choice.

Moreover, measuring people’s capabilities must be compatible with the cultural condition²⁷⁵ of each nation. Nussbaum emphasised that the question ‘what are people of the country actually able to do and to be?’ must be ‘given in each culture’s conditions’.²⁷⁶ According to Nussbaum, the most important functions and the associated capabilities to measure the quality of life of individuals depends on the cultural standards of each society.²⁷⁷

²⁷² Nussbaum, above note 19 at 40.

²⁷³ Nussbaum, above note 19 at 35.

²⁷⁴ Nussbaum, above note 19 at 33.

²⁷⁵ According to UNESCO, culture is regarded as ‘the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions, and beliefs’. Culture is characterised by three different aspects: (1) culture as the ‘process of artistic and scientific creation’; (2) culture as the ‘accumulated material heritage of human kind’; and (3) culture as the ‘sum total of the material and spiritual activities and products of a given social group, which distinguishes it from similar groups’. It is ‘the sum total of the knowledge, attitudes, and habitual behaviour patterns shared and transmitted by the members of a particular society’. Culture includes tangible and intangible cultural heritage. However, UNESCO recognises ‘the importance of the intangible cultural heritage as a mainspring of cultural diversity and a guarantee of sustainable development’. See more at UNESCO, ‘UNESCO Universal Declaration on Cultural Diversity’ (2 November 2001) Preamble <<http://portal.unesco.org/site/worldforum06/38703999.pdf>> (retrieved 3 October 2014); Stavenhagen. R, ‘Cultural Rights: A Social Science Perspective’ in H. Nie (eds) *Cultural Rights and Wrongs* (UNESCO, 1998) 4-5.

²⁷⁶ Martha Nussbaum and Jonathan Glover (eds), *Woman, Culture and Development: A Study of Human Capability* (Clarendon Press, 1995) 5.

²⁷⁷ Ibid.

3.3.2 The role of access to knowledge on human development

Access to knowledge is fundamentally important for human progress,²⁷⁸ because knowledge is ‘a resource of unique importance to human development’²⁷⁹ or the central theme of human progress.²⁸⁰ Romney states that

Knowledge, found mostly in humans, arises from human inventions, is learned and handed down from one generation to the next, and usually varies from one society to another...it is shared among relevant participants and...it is learned as part of our social heritage...In short, careful reflection reveals that the very notion of [knowledge] involves sharing of ideas, concepts, behaviours, etc...by more than one person.²⁸¹

Over time, knowledge has been accumulated when people observed natural phenomena in their environment and tried to establish rules and patterns in them. A variety of accumulated knowledge in economics, law, geography, relationships, personalities, arts, and literature empower humans to increase their political freedom, participation, education, and other choices. Romney indicated that ‘living standards today are higher than the eleventh century, primarily because we know more than medieval peasants’.²⁸² Similarly, Stiglitz posited that the development of nations is not only contributed to by the accumulation of capital, it is ‘largely attributed to closing the knowledge gap, the gap between the more developed and less developed countries in the knowledge of how to transform inputs into outputs’.²⁸³ That is to say, the progress of humans depends on the exploitation of the stock of knowledge, and knowledge has ‘a tremendous impact on social cohesion and development’.²⁸⁴

In addition, cultural knowledge, which is ‘the sum total of the knowledge shared and transmitted by the members of a particular society’,²⁸⁵ is a reservoir of creation, as well as a special resource for human capabilities:

The arts enrich the social environment with stimulating or pleasing public amenities...and artistic activity, by stimulating creativity...and enhancing innovation. Works of art and cultural

²⁷⁸ Suzor, above note 224 at 315.

²⁷⁹ Shaver, above note 94 at 6.

²⁸⁰ Mokyr, above note 2311 at 1.

²⁸¹ Romney, above note 21 at 104.

²⁸² Romney, above note 21 at 2.

²⁸³ Joseph E Stiglitz, *Public Policy for Knowledge Economy* (Department of Trade and Industry and Centre for Economic Policy Research, 1999) 3.

²⁸⁴ Hendrik van der Pol, ‘Key role of cultural and creative industries in the economy’ UNESCO Institute for Statistic of Canada <<http://www.oecd.org/site/worldforum06/38703999.pdf>> (retrieved 8 October 2014).

²⁸⁵ Ralph Linton 1940 cited by Lyman E Reed, *Preparing Missionaries for Intercultural Communication: A Bi-cultural Approach* (William Carey Library, 1995) 15.

products are a collective ‘memory’ for a community, and serve as a reservoir of creative and intellectual ideas for future generations. Arts and cultural institutions improve the quality of life.²⁸⁶

Similarly, the Australian Bureau of Statistics²⁸⁷ posited that cultural knowledge is not only a means to achieve economic growth, but also a factor of human development. To UNESCO, cultural knowledge gives man the ability to reflect upon himself.²⁸⁸ It makes specifically human, rational beings, endowed with a critical judgement and a sense of moral commitment. Via cultural knowledge man ‘expresses himself, becomes aware of himself, recognise his incompleteness, questions his own achievements, seeks untiringly for new meanings and creates works through which he transcends his limitations’.²⁸⁹ Cultural knowledge has the power to determine how people think, talk, and react. It seriously influences human’s knowledge, beliefs, habits, attitudes, communication, rituals, education, etc. Academia also agreed that cultural knowledge contributes to social cohesion, offers new livelihood opportunities,²⁹⁰ maintains cultural diversity,²⁹¹ and reduces social conflict, respects local values, and spurs sustainable development.²⁹²

The spread of knowledge has strong connections to human welfare, because it is the means upon which people can learn and grow and then transmit existing knowledge from one individual to another.²⁹³ Mokyr emphasised that the improvement of human capabilities ‘depend first and foremost on the efficiency and

²⁸⁶ Council of Europe, ‘*In from the Margins: A contribution to the debate on Culture and Development in Europe*’ European Task Force on Culture and Development (1997) <http://www.coe.int/t/dg4/cultureheritage/culture/resources/Publications/InFromTheMargins_EN.pdf> (retrieved 8 October 2014).

²⁸⁷ The Australian Bureau of Statistics, ‘*Measuring well-being: Frameworks for Australian Social Statistics*’ (2008) 1 <https://unstats.un.org/unsd/demographic/meetings/egm/NewYork_8-12Sep.2008/EGM%20Papers/Australia%20-%20Framework%20for%20social%20statistics.pdf> (retrieved 8 October 2014).

²⁸⁸ UNESCO, ‘Mexico City Declaration on Cultural Policies World Conferences on Cultural Policy’ (26 July – 6 August 1982) available at <http://portal.unesco.org/culture/en/files/12762/11295421661mexico_en.pdf/mexico_en.pdf> (retrieved 20 October 2014).

²⁸⁹ UNESCO, ‘*World Conference on Cultural Policies Final Report*’ (1982).

²⁹⁰ Rosemary J Coombe, ‘The expanding purview of cultural properties and their politics’ (2009) 5 *Annual Review of Law and Social Science* 393,395.

²⁹¹ Madhavi Sunder, Beyond Economic Analysis of Intellectual Property: The Need for Social and Cultural Theory (9 March 2009) <http://uchicagolaw.typepad.com/faculty/2009/03/beyond-economic-analysis-of-intellectual-property-the-need-for-social-and-cultural-theory-madhavi-su.html> (retrieved 14 October 2014).

²⁹² Sarah Radcliffe, *Culture in Development Thinking: Geographies, Actors, and Paradigm* (Routledge, 2006) 1-8

²⁹³ Suzor, above note 224.

cost of access to knowledge'.²⁹⁴ Shaver noted that the spread of knowledge in the areas of agriculture, industry, art, and medicine has led to the improvement of human's capabilities to live a long and healthy life, and enjoy joy and happiness via senses and emotions.²⁹⁵ He illustrated this point using cases of poor countries where it is difficult to access knowledge from learning materials, or advanced knowledge in medical treatment, new medicines, or communication technologies due to multiple causes such as poor infrastructure, high prices, malfunctioning markets, and legal restriction. As such, poor countries have suffered from the inability to translate existing knowledge to useful knowledge in order to improve human welfare.²⁹⁶ In comparison, wealthy individuals in the most developed countries, according to Shaver, efficiently obtain useful knowledge, so they effectively share benefits of advances in human knowledge.²⁹⁷ Shaver then concluded that:

Innovation and diffusion of knowledge contribute to human welfare in a number of ways, not simply through the sale of more and higher-value goods on world markets. Quality of life may be improved by expanding people's ability to access, utilise, and contribute to knowledge in ways that may not have direct profit potential – such as solving social problems neglected by the market, promoting and defending political and cultural freedom, and expressing human values through discovery and communication.²⁹⁸

The specific case of the spread of cultural knowledge, defined as cultural exchange or cultural diversity, is stressed as 'the key to sustainable human development',²⁹⁹ because it creates a rich and varied world that increases the range of choices and nurtures human capacities and values.³⁰⁰ Cultural exchange around the world, or cultural diversity, manifests as the spilling over of knowledge. It takes diverse forms across time and space; thus, it is 'the common heritage of humanity'.³⁰¹ It 'widens the range of options open to everyone; it is 'one of the roots of development, not simply only economic development, but also as a means to

²⁹⁴ Mokyr, above note 231 at 7.

²⁹⁵ Shaver, above note 94 at 6.

²⁹⁶ Shaver, above note 94 at 7.

²⁹⁷ Shaver, above note 94 at 7.

²⁹⁸ Shaver, above note 94 at 8.

²⁹⁹ UNESCO, *UNESCO Universal Declaration on Cultural Diversity* (2 November 2001) Article 11 <http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html> retrieved 7 October 2014).

³⁰⁰ UNESCO, *Convention on the Protection and Promotion of the Diversity of Cultural Expression* (2 October 2005) Preamble <http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html> (retrieved 7 October 2014).

³⁰¹ UNESCO, *UNESCO Universal Declaration on Cultural Diversity* (2 November 2001) Article 1, above note 299.

achieve a more satisfactory intellectual, emotional, moral, and spiritual existence'.³⁰² It expands the freedom, fairness, equality, democracy, and participation of human beings. It improves quality of life, education, health, and enriches the cultural heritage of human society. In short, it results in improvement of social justice or human well-being.

In addition, rich access to cultural knowledge also contributes to human progress, as it is a 'predicate for creative play'³⁰³ – one of the 10 human central capabilities. Progress of human beings occurs when users explore, learn, and use cultural knowledge hidden inside cultural products, and then create their own creative play within society.³⁰⁴ The current practice of user innovation provides an example. As stated above, recently user innovators have emerged who are the users of cultural products and also the innovators. Mostly, such innovators invent things for non-commercial purpose.³⁰⁵ Some individuals create or modify products or processes due to enjoyment or education. Studies of Open-Source Software communities indicated that many innovators developed software because of their passion and learning desires.³⁰⁶ Coming back to the case of the Flappy Bird game, this game was free and was created by a game amateur. In creating it, the creator needed to gain access to the Android platform, which is fortunately free for public access. Following this, he obtained ideas or knowledge about games on mobile devices such as mobile phones, tablets, and laptops. Next, he gained some experience by playing some previous games such as Piou Piou. If more users are able to gain access to such knowledge, more games might be created; thus, more added value is released and more contributions are made. William Fisher contended that user innovation enhances human life.³⁰⁷ It not only promotes a good life, but also satisfies fundamental needs, including autonomy, competence, engagement, self-expression,

³⁰² UNESCO, '*UNESCO Universal Declaration on Cultural Diversity*' (2 November 2001) Article 3 above note 298

³⁰³ Suzor, above note 2244 at 318.

³⁰⁴ Suzor, above note 224 at 318.

³⁰⁵ Fisher, above note 35 at 1433-35. Fisher analysed that modifiers may be both amateurs and professionals, but they modify things or create new things 'for fun' or 'for themselves'. Thus, 'at least for now, it seems sensible to avoid separating user-innovators into professionals and amateurs'.

³⁰⁶ Hertel et al, 'Motivation of software developer in Open Source Software Projects: an Internet-Based Survey of Contributors to the Linux Kernel' (2003) 37(2) *Research Policy* 1159; K R Lakhani and B Wolf, 'Why hackers do what they do: understanding motivation and effort in free/open source software projects' In Brian Fitzgerald et al. (eds), *Perspectives on Free and Open Source Software* (MIT Press, 2005)

³⁰⁷ Fisher, above note 35 at 1463-1472.

and community. Therefore, increased access to the distribution of cultural knowledge, or expression for users to utilise, explore, and manipulate for purpose of creative play, is beneficial for a good life.

Moreover, access to knowledge for decentralised innovation positively impacts human development. The motivation of user-created content is mostly connected with peers, ‘achieving a certain level of fame, notoriety or prestige, and self-expression’;³⁰⁸ therefore, such activities can provide information and knowledge, educate citizens, and build collaboration between them. As worded by the OECD, ‘user-created content can also be seen as an open platform, enriching political and societal debates, diversity of opinion, free flow of information, and freedom of expression’.³⁰⁹ All of these factors enrich human lives.

In summary, this thesis argues that wide-spread access to knowledge is a fundamental component of human progress, because knowledge is a resource of unique importance to human development. Knowledge accumulated and transferred from one generation to the next helps people to learn and grow. Cultural knowledge is particularly important for human development, because it has the power to determine how people think, talk, and react. It seriously influences human’s knowledge, beliefs, habits, attitudes, communication, rituals, and education. Access to knowledge improves quality of life by enhancing human’s capabilities, such as education, health, participation, play, and senses. This argument connects to the theme of the thesis: that a balanced copyright system with proper copyright limitations and exceptions will ensure that members of society have sufficient access to knowledge to use, learn from, and reproduce for the purpose of enhancing human capabilities.

3.4 ACCESS TO KNOWLEDGE, ACCESS TO THE EXPRESSION OF KNOWLEDGE AND COPYRIGHT

It can be argued that copyright does nothing in regards to access to knowledge, because it protects works expressed in a material form, not the knowledge content itself. This is not accurate, because access to knowledge has a close connection to access to the expression of knowledge. This section emphasises that copyright protection may impact access to knowledge because it creates barriers to access and

³⁰⁸ OECD, above note 1 at 4, 20; Fisher, above note 35 at 1419.

³⁰⁹ OECD, above note 251.

to the expression of knowledge; thus, copyright impacts on innovation and development. It supports the argument that copyright impacts on innovation and development, as it impacts on access to the expression of knowledge, which determines the rate of innovation and development.

3.4.1 The relationship between access to knowledge and access to the expression of knowledge

Knowledge content cannot exist by itself, but requires expression in a certain way, as it is a process by which a novel idea is originated and invented by an individual carrier, and then adopted and retained by a population of people.³¹⁰ To be accepted as knowledge, rules must be adopted and retained by many people. In order to do so, knowledge must be encoded into a certain type of expression, such as oral, performance, written, or video clips by an agent, and then decoded into knowledge by other agents.

Knowledge can be encoded and transmitted directly by word of mouth from individual to individual, but all important knowledge has been fixed in a tangible medium of expression. For example, traditional knowledge, which is ‘knowledge, know-how, skills, and practices that are developed, sustained, and passed on from generation to generation within a community’,³¹¹ mostly transmitted in oral forms from ancient times to present.³¹² Traditional knowledge contains rich information of arts, craft, dance, and cultural expression, belief systems, customary law, environmental knowledge of plants and animals, and kinship systems.³¹³ It is not copyrightable if it is often in oral form. However, important knowledge that shapes mainstream knowledge of human beings has existed in concrete form, whether it is written on a piece of paper, recorded on an audiotape or videotape, or stored on a computer disk or hard drive. Indeed, across the world, knowledge is often contained in a material form such as books, articles, images, posters, diagrams, figures, or digital forms. This is particularly true of scientific knowledge, which is extremely important for innovation and development, as scientific knowledge ‘has led to

³¹⁰ Dopfer and Potts, above note 22 at 6.

³¹¹ WIPO, Traditional Knowledge available at <<http://www.wipo.int/tk/en/tk/>> (retrieved 20 May 2015).

³¹² Terri Janke, *Writing up Indigenous Research: authorship, copyright and Indigenous knowledge systems* (Terri Janke and Company Pty Ltd, 2009) 8.

³¹³ Ibid.

remarkable innovations that have been of great benefit to humankind’³¹⁴ and ‘contributes to providing everyone with a deeper understanding of nature and society, a better quality of life, and a sustainable and healthy environment for present and future generations’.³¹⁵ Scientific knowledge often exists in written expressions³¹⁶ and is protected by copyright. Hence, access to scientific knowledge often requires permission to access the expression of such knowledge. Even with traditional knowledge, many have been written down by living authors and are protected by copyright. For instance, the book *Woman From Nowhere*³¹⁷ written by Kerry McCallum contains cultural stories retold by an indigenous person, Hazel McKellar. This book is protected by copyright, so the access to such cultural knowledge is restricted by copyright protection. That is to say, getting access to knowledge for innovation and development often requires people having access to its expression, which is copyrightable.

3.4.2 Copyright and access to knowledge

Copyright protects the expression of the ideas, not the ideas themselves;³¹⁸ hence, it restricts people from accessing knowledge when it erects a barrier for them to touch the original expression of knowledge. In obtaining knowledge, people initially have to access its material form, adopt it, and reuse it. If knowledge is transmitted orally, copyright does not evolve. Copyright is there to stop people from using it without permission. For example, Eskimos’ knowledge on how to hunt a polar bear is transmitted orally from generation to the next; such knowledge is not protected by copyright. However, if this technique is written down (subject to the permission of the native people), this work is protected by copyright. If someone would like to learn the technique, he must either travel to the northern circumpolar region or have the right to access the book. In addition, in the field of classical music, a potential composer who wants to create a composition must be a learner, first through reading or listening to classical music works to get ideas in this field and

³¹⁴ UNESCO, Declaration on Science and the use of Scientific Knowledge, (Budapest 26 June – 1 July 1999), Article 2 <http://www.unesco.org/science/wcs/eng/declaration_e.htm>.

³¹⁵ Ibid, Article 1.

³¹⁶ Natives Science Organisation, ‘What is traditional knowledge?’ <http://www.nativescience.org/html/traditional_knowledge.html> (retrieved 20 May 2015).

³¹⁷ Hazel McKellar (as told to Kerry McCallum), *Woman From Nowhere: Hazel McKellar’s Story* (Magabala Books, 2000).

³¹⁸ Neil Weinstock Netanel, *Copyright’s Paradox* (Oxford University Press, 2008) 81; Anne Fitzgerald and Brian Fitzgerald, *IP in principle* (Thomson Lawbook Com., 2004) 245.

then generating his/her own works. Copyright allows the copyright owner to control the access to the knowledge expression; thus, restricting access to the knowledge.

3.5 BALANCED COPYRIGHT AND ACCESS TO KNOWLEDGE FOR INNOVATION AND DEVELOPMENT

Copyright began at the beginning of the 18th century in England in the British *Statute of Anne 1710* after the invention of the printing press by Johann Gutenberg. From its birth, copyright law has been a means to solve complex conflicts of interests among authors or creators, editors and users in dissemination of information and usage of cultural goods. It plays an important role in ‘determining whether knowledge is shared widely for the benefit of all, or controlled and monopolised for the benefit of a few’.³¹⁹ This section evaluates how the copyright system works and how it impacts on access to knowledge. First, copyright protection that provides incentives to authors to invest in the production of cultural works is discussed. Mainstream thought established from the first copyright law in the *Statute of Anne* is that copyright encourages learning by granting copyright owners exclusive rights over expression so that they can recoup their cost of production.³²⁰ However, this dominant copyright theory delays the spread of knowledge and impedes innovative creativities and human progress within society because it focuses on monopolies for production rather than access. A balanced approach to copyright, where limitations and exceptions are important, is necessary to ensure the public can obtain sufficient knowledge and information for further innovation and development. This section then concentrates on a balanced copyright towards access to knowledge for innovation and development. This argument links to the overall concept of the thesis: that a balanced copyright, where copyright limitations and exceptions are essential, is a must to facilitate access to knowledge for innovation and development.

3.5.1 Knowledge and copyright protection for innovation and development

This thesis has shown that knowledge or ideas are central to innovation and human development; hence, access to knowledge is a determinant of innovative

³¹⁹ Lea B Shaver (eds), *Access to Knowledge in Brazil* (Yale University Press, 2008) 8.

³²⁰ The title of the *Statute of Ann 1710* declared that this law is ‘an Act for the encouragement of learning, by vesting the copies of printed books in the authors and purchasers of such copies, during the times therein mention’. See more at Ronan Deazley, ‘Commentary on the *Statue of Anne 1710*’ in L Bentley and Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (University of Birmingham, 2008) <http://www.copyrighthistory.org/cam/commentary/uk_1710/uk_1710_com_272007105424.html> (retrieved 11 January 2013).

activities as well as developing human capabilities. This then raises the question: why do we need copyright, as it can temporarily block access to knowledge by controlling users' access to the expression of knowledge?

Actually, copyright protection is a vital part in allowing people to share their knowledge because the nature of knowledge is a public good, which is typically non-rivalrous and can be non-excludable. As said in Section 1.1.4, copyright, as an external force, grants the copyright owner a limited monopoly in order to control and charge on the use of the work to recoup on investment of production. Doing so stimulates the author to invest more in the next creation of the expression and willingness to disseminate their expressed knowledge to others.

According to the Neoclassical Economists, copyright protection, a part of intellectual property rights, is a means for incentivising innovation, as it stimulates creators via economic return. Knowledge is a public good, so 'the copyright law specifies the existence of property rights in goods that do not yet exist and that will not be called into existence without the knowing participation of an artist or author'.³²¹ Moreover, it is necessary to maintain copyright protection, otherwise 'appropriability problems would occur'.³²² For instance, Landes and Posner believed that the purpose of copyright law is to 'maximise the benefits from creating additional works, minus both the losses from limiting access and the cost of administering copyright protection'.³²³ This is because the expenditure to produce a copyright work consists of the cost of creating the work, the 'cost of expression', plus the cost of reproducing the work. The cost of production includes the cost of copying plus copyright enforcement costs. The author only creates the work when expected revenue exceeds such costs. Hence, if the cost of copying is low (due to the technological advances), copyright protection should expand to lift the copyright enforcement cost. Plant said that although authors still keep creating their works even

³²¹ Michael O'Hare 'Copyright: When Is Monopoly Efficient?' (1985) 4 *Journal of Policy Analysis and Management* 407, 410.

³²² Claudia Schmid, 'Is copyright protection necessary to promote innovation – an evolutionary economics approach' <<http://www.atrip.org/Content/Essays/Claudia%20Schmid.pdf>> 5.

³²³ William M Landes and Richard A Posner, 'An Economic Analysis of Copyright Law' (1989) 18 *Journal of Legal Studies* 325, 326.

in the absence of copyright,³²⁴ ‘the higher the profits from the copyright monopoly, the greater the willingness to publish the doubtful successes’.³²⁵

In addition, copyright protection may bring Foreign Direct Investment (FDI) and technology transfers to developing countries, which are good for economic development in developing world.³²⁶ In theory, firms engage in FDI to maximise profits or value. Thus, FDI may rise as IPR levels strengthen to the extent that IP protection (copyright) affects the ability of firms to capture rent and returns on their investments. Theoretical literature contains a number of studies on the effects of IPRs on FDI in developing countries. For example, Lai³²⁷ developed a model in which northern firms innovate, while southern firms imitate. If and when a southern firm successfully copies a northern innovation, it becomes the producer and exporter of the good due to its factor cost advantage, thereby displacing the northern firm that was the original innovator of the good. Northern firms, however, have the option to produce in the south; that is, to be a multinational firm. Wages are lower in the south, but imitation risks are higher. Therefore, stronger IPRs (copyright) in the south reduce the risk of imitation and increase the expected returns of being a multinational firm. As a result, more production is transferred from the north to the south. This means stronger IPRs are associated with higher rates of FDI.

Maskus and Penubarti³²⁸ and Yang and Maskus³²⁹ assert that strong IPRs (copyright) increase the volume of technology transfer to developing nations. A firm in country X transfers IP-sensitive commodities to country Y, and country Y then strengthens its IPRs. On one side, the firm expands its market because of a reduction in imitation by local firms. The demand curve it faces in country Y shifts out. On the other side, stronger IPRs (copyright) in country Y lift the firm’s market power up,

³²⁴ He argued that British authors in the 19th century still created their works and earned more money than their colleagues in the US regardless of the fact that there was copyright law in the US but not in England. See more at Arnold Plant, ‘The Economic Aspects of Copyrights in Books’ (1934) 1 *Economic Journal* 167, 172.

³²⁵ Ibid at 183.

³²⁶ Kamil Idris reported that a healthy IP system, including copyright, introduced in India created a steady increase in the level of FDI in India and a dramatic growth in FDI in Brazil. See more at Idris, above note 27 at 5.

³²⁷ Edwin Lai, ‘International IPRs Protection and the Rate of Production Innovation’ (1998) 55 (1) *Journal of Development Economics* 133, 133-153.

³²⁸ Keith Maskus and Mohan Penubarti, ‘How Trade-Related Are Intellectual Property Rights?’ (1995) 39 (3-4) *Journal of International Economics* 227, 227-48.

³²⁹ Guifang Yang and Keith Maskus, ‘Intellectual Property Rights and Licensing: An Econometric Investigation’ (2001) 137 (1) *Weltwirtschaftliches Archiv* 58, 60-79.

reducing the elasticity of the demand it faces. Maskus and Penubarti posited that a market expansion effect and a market power effect stimulate firms to transfer technology to other countries.³³⁰ More convincingly, Dunning³³¹ found that the composition of technology transfers depends on three main factors: ownership, location, and internalisation. The ownership factor influences a firm's decision to enter a foreign market. A firm selling a good abroad has a disadvantage competing with producers who know the local market better. Thus, the firm needs some advantages to encourage FDI. The location factor also influences a firm's decision to enter via export or FDI. Exporting goods may cost less than setting up a subsidiary abroad. Hence, the firm needs some locational incentives to undertake FDI. The internalisation factor influences a firm's decision to produce the good through its subsidiary or to licence the production to another party. The firm will only choose to internalise production if it has some advantages to control the production process. Fortunately, strong IPRs in the host country can affect each of these factors. Firstly, the protection of ownership of valuable intangible assets helps a firm to overcome the costs of setting up a subsidiary abroad, as well as stimulating the multinational firm's incentive to innovate and invest in R&D that gains more valuable intangible assets. These assets, in turn, would become the basis for future FDI or other technology transfers. Secondly, the strength of IPRs in a host country makes up part of the local business investment climate. Thus, it provides a locational advantage for firms to establish a subsidiary in a host country. Thirdly, IPRs can influence the firm's decision between FDI and licensing. If IPRs are strong and enforceable, firms are more likely to license the production to other parties. If IPRs are not sufficiently strong, firms are more likely to internalise the value of the asset by producing the good in-house (within a local plant or a subsidiary) or by licencing it to a close affiliate.

In short, traditional literature has illustrated that copyright protection as an economic tool could increase incentives to innovation, and increase FDI and technology transfer between firms and countries. However, recent debates have opposed this point by stating that a copyright balanced between private protection and the public interest in accessing copyrighted works without slanting towards

³³⁰ Maskus and Penubarti, above note 328.

³³¹ John Dunning, 'Towards an Eclectic Theory of International Production: Some Empirical Tests.' (1980) 11(1) *Journal of International Business Studies* 9, 9–31.

private protection is what is required. The next section discusses a balanced copyright and how it can facilitate innovation and development.

3.5.2 A balanced copyright facilitates access to knowledge

Since the 1990s, the Evolutionary Economists have taken the balanced approach that copyright can facilitate innovation and economic growth via production stimulation associated with the encouragement of dissemination. They noted that knowledge growth, the gene of innovation, and the origin of development, are determined by imitation and invention.³³² Imitation refers to the capability to access knowledge, where people can obtain knowledge to learn, use, and reuse it in creative way; whereas invention means the production of knowledge. The degree of imitability and inventibility depends firstly on the legal protection of copyright.³³³ Copyright brings fair return to copyright owners in order to encourage the production of knowledge expression in the first place. However, it restricts the imitation or access to knowledge in exchange for greater production. Therefore, overly strong copyright protection shrinks the access to knowledge or imitation, but too weak copyright protection decreases the motivation of invention. Both circumstances restrict knowledge growth.³³⁴ Hence, copyright must balance between protecting copyright owners' exclusive rights and encouraging access to knowledge to facilitate innovation and development. Lunney observed that 'the more desirable a work is, the greater is the need to ensure the creation of the work and the greater the need to secure its widespread dissemination'.³³⁵ Schmid also emphasised that how much copyright facilitates innovation and economic growth depends on the capability of copyright to balance incentives to innovate and the access to information.³³⁶

³³² Ryo Horri and Tatsuro Iwaisako, 'Economic Growth with Imperfect Protection of IPRs' (2007) 90 (1) *Journal of Economics* 45, 45-85. The authors argued the interaction between IPR protection and the invention and imitation. Also, Christine Greenhalgh and Mark Rogers, 'The value of IPRs to firms and society' (2007) 23 (4) *Oxford Review of Economic Policy* 541, 544-550; Carmen Nadia Ciocoiu, 'Considerations about IPRs, Innovation and Economic Growth in the Digital Economy' (2011) 14 (2) *Economia: Seria Management* 310, 313; Aleksei Kelli and Heiki Pisuke, 'IP in an Innovation-based Economy' (2008) 33 *Review of Central and East European Law* 223, 228; David M Gould and William C Gruben, 'The role of IPRs in economic growth' (1996) 48 *Journal of Development Economics* 323, 345-350.

³³³ Teece, above note 31 at 1134.

³³⁴ See more about how the knowledge grows at Section 2.1 of this chapter.

³³⁵ Glynn S Lunney, 'Reexamining Copyright's Incentives – Access Paradigm' (1996) 49 *Vanderbilt Law Review* 483, 486 cited by Claudia Schmid, 'Is copyright protection necessary to promote innovation? An evolutionary Economics Approach' available at <<http://www.atrip.org/Content/Essays/Claudia%20Schmid.pdf>> at 3.

³³⁶ Schmid, above 335.

Additionally, balanced copyright is necessary for the promotion of cultural diversity,³³⁷ which is a source of creativity and innovation in a community. It has been witnessed that numerous creations have generated from people who lived with cross-culture. Take the case of Britain's greatest engineer, Isambard Kingdom Brunel, as an example.³³⁸ He is the creator of the Great Western Railway, the Clifton Suspension Bridge, and the 'Floating Harbour'. Brunel's invention is in part due to his genius, but more importantly, it was rooted in the fact that he was 'a child of mixed heritage, with an English mother and a father who came to Britain as a refugee from revolutionary France'.³³⁹ Brunel is a great example of the notion that 'when you bring strange or different elements together you have the ingredients for a divergent way of thinking, the prerequisite of inventiveness'.³⁴⁰ Likewise, 'The Bristol Sound' created critical acclaim in the US and even globally in the 1990s.³⁴¹ It was comprised from a collection of bands, including Massive Attack, Portishead, Tricky, and Roni Size – their music grew out of a remarkable network of multi-ethnic musicians. That is to say, growing cultural diversity is a source of creativity, innovation, and ultimately competitive advantage, which is the important element of development. Cultural diversity is strengthened by 'ensuring the free flow of ideas, freedom of expression, equal access to art, and to scientific and technological knowledge, and the possibility for all cultures to have access to the means of expression and dissemination'.³⁴² It is obvious that balanced copyright, where access is secured, ensures the efficient movement of knowledge and expression.

Balanced copyright is vital to ensure broad access for decentralised innovation in the digital age. As discussed above,³⁴³ decentralised innovation characterised by users' generated content needs broad access to knowledge content for greater

³³⁷ Thierry Desurmont, 'Considerations on the Relationships Between the Convention on the Protection and Promotion of the Diversity of Cultural Expression and the Protection of Authors' Rights' (2006) *UNESCO e-Copy Bulletin Doctrine and Opinions* 1
http://portal.unesco.org/culture/en/files/32555/11655864341desurmont_en.pdf/desurmont_en.pdf
 (retrieved 20 January 2015).

³³⁸ This example is drawn from *The Guardian*, 'Intercultural innovation' (23 February 2005)
<http://www.theguardian.com/artanddesign/2005/feb/23/artspolicy.regeneration> (retrieved 8 October 2014).

³³⁹ Ibid.

³⁴⁰ Ibid.

³⁴¹ See more at Tingo's planet, 'The Bristol Sound' (21 May 2011),

<http://tingoes.wordpress.com/2011/05/21/the-bristol-sound/> (retrieved 8 October 2014).

³⁴² UNESCO, *UNESCO Universal Declaration on Cultural Diversity* (2 November 2001) Article 6 above note 291.

³⁴³ Section 3.2.3 of this chapter.

production. However, knowledge content accumulated by expressions is protected by copyright that requires payment and permission per view. Hence, copyright infringement issues may arise as users adapt original works without permission or payment. Copyright limitations and exceptions, which allow the reproduction and adaptation of works without the authorisation of the owner in certain circumstances, are seen as tools to balance between protection and wide dissemination of knowledge to the public. Limitations and exceptions ensure the public can obtain content access for their greater production.

Recently, a number of commentators have warned about the problem of current, overly-strong copyright protection for innovation and development and have suggested rebalancing the copyright system. Grossman and Helpman,³⁴⁴ Levine and Renelt,³⁴⁵ and Gould and Gruben³⁴⁶ asserted that strong IPR protection (copyright) increases innovation in the short term because the profitability of innovation increases, but in the long term the rate of innovation declines, as the law takes resources away from innovation. Horri and Iwasako found via empirical studies that strong IPRs protection (copyright) lowers the possibility of imitation and raises negative effects on growth.³⁴⁷ Likewise, Pamela Samuelson made an obvious point that strong copyright protection could not provide incentive for the creation of work. It would bring a long term of above-cost pricing, as well as substantial transaction costs to subsequent users. It impedes public access to many works that are no longer commercially exploited, but may still be of interest, and prevents the creation of many new derivative works.³⁴⁸ She then stated that ‘a well-functioning copyright law carefully balances the interests of the public and of the copyright owner’.³⁴⁹ According to Samuelson, a balanced copyright system should encourage and support creation and promote dissemination and enjoyment of work at the same time in order to foster growth, exchange knowledge, and culture.³⁵⁰ Patterson and Lindberg stated

³⁴⁴ Grossman and Helpman, above note 192.

³⁴⁵ Ross Levine and David Renelt, ‘A sensitivity analysis of cross-country growth regression’ (1992) 82 *American Economic Review* 942, 946.

³⁴⁶ Gould and Gruben, above note 332 at 329.

³⁴⁷ It increases the expected profit from R&D and reduces the number of competitive sectors where R&D is more active. See more at Horri and Iwasako, above note 332 at 79-80.

³⁴⁸ Pamela Samuelson, ‘Should economics play a role in copyright law and policy?’ In Lisa N Takeyama et al, (eds), *Developments in the Economics of Copyright: Research and Analysis* (Edward Elgar, 2005) 7.

³⁴⁹ Pamela Samuelson and Members of the CPP, ‘The Copyright Principles Project: Directions for Reform’ (2010) 25 *Berkeley Technology Law Journal* 1, 6.

³⁵⁰ Ibid.

that copyright is the social contract between the author and the public; thus, it should be fair.³⁵¹ Netanel,³⁵² Litman,³⁵³ Suzor,³⁵⁴ Mokyr,³⁵⁵ Shaver,³⁵⁶ Stewart³⁵⁷, Hesse³⁵⁸, and Fitzgerald³⁵⁹ have all raised the issue of the necessity of balanced copyright.

3.5.3 Unbalanced copyright law hurts innovation and development in developing countries

Unbalanced copyright law provides too much protection of copyright owners in developing countries. In the harmonisation of global trade, developed countries have been pushing developing countries to join regional and international regimes, including the copyright regime, that are modelled by the developed world towards the strength of IPRs. A rapid global expansion and upward harmonisation of copyright protection has been seen in the past two decades, particularly since the *TRIPS Agreement* in 1994. In many developing countries, the terms of protection have expanded³⁶⁰ or have asked³⁶¹ for the expansion from 50 to 70 years. The scope of protection has been extended to new subject matters such as computer software, databases, and subject matters other than works. A number of exclusive rights of the copyright owner have also been added.³⁶² Moreover, the protection has been globally

³⁵¹ Patterson and Lindberg, above note 112 at 138. Copyright is a social contract between the author and public, because authors take advantages from common human knowledge; they should have a commitment to return to the society their fruits. For example, Greek civilisation is commonly regarded as the source of a mode of formal reasoning known as the syllogism. The Greek people created the syllogistic logic thousands of years ago. It is part of common human heritage. From this syllogistic logic, American, British, or Israeli software companies have built up computing programs that earn them a lot of money from licensing and selling intellectual productions; copyright owners have taken creation of community into their own intellectual products and claim a monopoly to return their investment. To be fair, it could be said that these software companies should compensate Greek people for their knowledge. In reality, they are not required to do so. Therefore, it is fair for them to consecrate their works to the public domain or allow other people to reasonably use their works for social purposes under certain conditions.

³⁵² Netanel, above note 318 at 231.

³⁵³ Jessica Litman, 'The Exclusive Right to Read' (1994) 29 *Cardozo Art and Entertainment Law Journal* 29, 51-2.

³⁵⁴ Suzor, above note 224 at 297.

³⁵⁵ Mokyr, above note 231.

³⁵⁶ Shaver above note 94.

³⁵⁷ Stephen M Stewart, *International Copyright and Neighbouring Rights* (Butterworths, 1989) 5.

³⁵⁸ Hesse, above note 36 at 39.

³⁵⁹ Brian Fitzgerald and Anne Fitzgerald, *Internet and E-commerce Law, Business and Policy* (Lawbook Co., 2011) 233-280.

³⁶⁰ Argentina, Albania, Brazil, Chile, Costa Rica, South Korea, Singapore; especially Colombia 80 years, Mexico 100 years. See more at WIPO, Copyright <<http://www.wipo.int/copyright/en/>> (retrieved 12 March 2013).

³⁶¹ After signing the VN-U.S. BTA, Vietnam has been asked to increase the term of protection from fifty to seventy years.

³⁶² From only the right of reproduction, copyright today grants copyright owners the rights to exhibition, distribution, communication to the public, performance.

recognised by bilateral, regional, and international treaties. Copyright protection has been mandatorily engaged into trade agreements, in which the protection of copyright is exchanged for concessions in other areas. Furthermore, the enforcement has been effectively enhanced by either civil or criminal penalties. In addition, copyright law supports copyright owners to use technological protection measures (TPMs) to control access and use by users.³⁶³

Too much emphasis on the protection of creativity is bad for innovation and development of developing countries, as they need access to advanced international knowledge to improve growth rather than involve in creativity. In the 2000s, some scholars believed that IPRs (copyright) were beneficial for developing countries because they facilitated invention, attracted FDI and technology transfer, and improved the availability of medicine to contribute to poverty reduction and health improvement.³⁶⁴ However, developing nations increasingly raise opposition regarding IPRs role. Empirical studies by Leger emphasise that there is no evidenced link between strong IPRs and the increase of innovation in developing countries.³⁶⁵ In actuality, developing countries have low innovative capabilities and rely on industrial nations for the provision of new technology and knowledge.³⁶⁶ Consequently, entrepreneurs in such nations must adopt new knowledge from industrial nations in order to increase the utilisation of knowledge and achieve accelerated growth. Most developing countries are importers,³⁶⁷ while ‘strong IPRs stimulate innovation and development in the source countries but cause losses for destination ones’.³⁶⁸ The evolution of strong IPRs raises the cost of importing knowledge: limited access. This

³⁶³ WCT and WPPT 1996.

³⁶⁴ Commission on IPRs (CIPR), *Integrating IPRs and Development Policy* 6 (2002) <http://www.iprcommission.org/papers/text/final_report/reportwebfinal.htm>; Maskus, above note 41 at 472.

³⁶⁵ Andreanne Leger, ‘The Roles of IPRs for Innovation: A Review of the Empirical Evidence and Implications for Developing Countries’ (Discussion Paper No 707, German Institute of Economic Research, 2007) available at <<http://www.diw.de/documents/publikationen/73/61916/dp707.pdf>> (retrieved 20 January 2015).

³⁶⁶ Aubert, above note 90 at 8.

³⁶⁷ CIPR Report 2002, above note 364. Vietnam is a net importer of cultural works. See more in Chapter Two of this thesis.

³⁶⁸ Carsten Fink and Carlos A Primo Braga, ‘How stronger protection of IPRs affects international trade flows’ In *IP and Development, lessons from recent economic research* (World Bank Publication, 2005) 19-22.

can adversely decrease the incentives of innovative creativity and development in developing countries.³⁶⁹

Moreover, unbalanced copyright is a significant barrier to human development in developing countries. As examined above in Section 2.2, knowledge is important for human progress, and access to knowledge is needed. In developing countries where not only material well-being but also quality of life is low, the demand of access is higher than the rest of the world. Copyright products that are too expensive make access impossible for the majority of the population. The level of development in education, for example, is low in developing nations,³⁷⁰ and education is a direct path towards food security, rising out of poverty, improving social, cognitive, and health issues, as well as equality and freedom in the society.³⁷¹ Among various factors, overly strong copyright protection presents a barrier. It increases the price of educational materials and raises school fees. UNESCO noted that the publishers of the most-needed educational materials are located in the developed world.³⁷² Rested on strong universal copyright protection, they push up the price of their educational materials. Developing nations are not able to afford this and this severely impacts people's 'ability to learn, enjoy, and play'.³⁷³

In the digital age, unbalanced copyright – namely, too much protection and few limitations and exceptions – significantly threatens public access and harms innovation and development in developing countries. Recently, rapidly expanding and changing information and communication technologies stimulated by the internet

³⁶⁹ Dru Brenner-Beck, 'Do As I say, Not As I Did' (1992) 11 *UCLA PAC. BASIN L. J.* 84, 91; Michael J Finger, 'Introduction and Overview' In *Poor People's Knowledge: Promoting IP in Developing Countries* (World Bank Publications, 2004) 1, 101; Rut Towse, 'Copyright and Artists: a view from cultural economic' in Michael McAlleer and Les Oxley, *Economic and Legal Issues in IP* (Blackwell Publishing, 2007). The CIPR Report 2002 also confirmed that after introducing IP laws, the cost of textbooks and other educational material is dramatically inflated in developing countries. Consequently, the law puts copyright works out of the reach of many consumers and exhausts the budgets of schools and universities. See more at CIPR Report 2002, above note 364.

³⁷⁰ Aubert, above note 90 at 9. It was reported by UNESCO in 2012 that 20% of young people in developing countries failed to complete primary school and lacked skills for work. See more at UNESCO Press (16 October 2012) <http://www.unesco.org/new/en/media-services/single-view/news/twenty_percent_of_young_people_in_developing_countries_fail_to_complete_primary_school_and_lack_skills_for_work/#.VL8l-GOtRek> (retrieved 20 January 2015).

³⁷¹ See more at The Hewlett Foundation's Global Development and Population Program, 'Quality Education in Developing Countries' <<http://www.hewlett.org/programs/global-development-population/quality-education>>.

³⁷² UNESCO, Sustainable Book Provision (11 August 2014) <http://www.unesco.org/education/blm/guidecontent_en.php>. UNESCO showed that the trade in books is one-sided, which is the exportation of books from industrial to developing countries.

³⁷³ Shaver, above note 319.

explosion have been witnessed in the developed³⁷⁴ and developing world³⁷⁵. This explosion has totally transformed the access to knowledge and the distribution of content.³⁷⁶ Knowledge and information have recently been encoded in digital formats³⁷⁷ and controlled by the copyright owner using technological protection measures (TPMs). TPMs or ‘digital locks’ are technological locks copyright owners use to restrict unauthorised access and use.³⁷⁸ They enable the copyright owner to

³⁷⁴ It was reported by Internet World Stats that by the end of 2014 the number of internet users reached more than 3 billion (42% global population). Internet diffusion has been driven by a series of innovations allowing people to choose how they access the internet. If home computers and telephone landlines opened the way to access the internet, broadband and mobile phones are increasing internet access and have enlarged the scope for its use. New broadband technology – optic fibres – provides greater opportunities for content creation by end users due to high upload speeds. In 2010, advertised upload speeds on fibre were over 20 times faster than on DSL and cable. The high demand for broadband has been supported by hi-tech devices such as iPhones and similar wifi-enabled Smartphones and notebooks. In addition, digital television use is increasing. Over 90% of households had access to digital television in Australia, the United Kingdom, Finland, Sweden, Spain and Luxembourg in 2009; 13 of the OECD countries have completely switched to digital television. Consequently, more and more daily activities, such as shopping, banking, reading news, playing music, and cultural works have moved from the physical to digital world. Nearly 30% of individuals download music or play games on the internet. The internet can do even more than that, as it allows internet users to create their own content such as various forms of written, audio, visual and combined media. Approximately 20% of the OECD internet users use peer-to-peer file sharing and around 50% of the OECD internet users engage in social networking such as Facebook, Twitter, Yahoo, Google. See more at Internet World Stats, ‘Number of Internet users (2014)’ <www.internetlivestats.com/internet-users/>; OECD, The future of the internet economy – a statistical profile, the *OECD Ministerial Meeting on the Future of the Internet Economy 2011* (29 June 2011) <<http://www.oecd.org/dataoecd/24/5/48255770.pdf>>; Andrew Reddick and Christian Boucher, *Rethinking the Information Highway: Rethinking the Dual Digital Divide* (Ottawa: Depository Service Program, 2001) 26; Government of Canada, ‘Broadband Canada: connecting rural Canadian’ Government of Canada <<http://www.phandaction.gc.ca/initiatives/eng/index.asp?initiativeID=96&mode=2>> cited by Nathan Irving, ‘Copyright law for the digital world: an evaluation of reform proposals’ (2010) 10 *Asper Review in International Business and Trade law* 141.

³⁷⁵ It was reported in 2013 that 31% of the population in the developing world is online. The number of mobile broadband users is roughly 1.16 billion, approximately 38% of universal mobile broadband users. See more at ITU Telecommunication Development Bureau, ‘The World in 2013: ICT Facts and Figures’ <<http://www.itu.int/en/ITU-/Statistics/Documents/facts/ICTFactsFigures2013-e.pdf>> (retrieved 28 January 2014).

³⁷⁶ See more at Computer Science and Telecommunication Board National Research Council, *Digital Dilemma: IP in the Information Age* (National Academy Press, 2000).

³⁷⁷ Such as Word file, .wav, .mp3, .pdf.

³⁷⁸ Firstly, TPMs can be used to control access at the online outlet, e.g. user identification by a proper key, which often comes in the form of a password. In the online environment this can control access to protected content. If the user applies the proper key, the technology will let him in. TPMs can also control access at the level of the user or receiver of the information. For instance, a set top box for a cable TV service is a technology that digitally scrambles content to prevent unauthorised uses unless descrambled or decrypt by a proper key. To control access, TPMs can prevent subsequent access as well. It is now common practice to post a version of a computer program on the internet so that potential customers can download and try it out. After having it run for a certain period of time, the program will shut itself off and require the user to purchase a copy that will last longer. This enables the copyright owner to ‘bill per use’. Secondly, TPMs can control certain uses of the work after it has been accessed. Copy-control TPMs, for example, can prevent the making of copies: the duplication of CDRs or a DVD can incorporate a location code (a TPM) that prevents not only its reproductions but also its distribution in a network. Likewise, a hardware lock called a ‘dongle’ is used in connection

‘bill per use’,³⁷⁹ and detect unauthorised access effectively. They also allow the copyright owner to shape his own conditions or construct private rules for each end-user using the digital licensing contract. Currently, copyright owners abuse TPMs as technical fencing to prevent all unlicensed access, even access permitted by law under copyright limitations and exceptions. The use of TPMs has been strongly supported by the global community under the *WCT* and *WPPT* and has been implemented by most nations. Circumventions of TPMs are liable as civil or criminal offences. Lawrence Lessig stated that current copyright laws have given copyright owners ‘the power to control innovation in the context of the Net’.³⁸⁰ In contrast, the international community has ignored the negative effect of strong TPMs protection into access. In particular, it requires that nation members enforce civil or criminal liabilities for circumventing TPMs without respecting limitations and exceptions, which provide public access. It is foreseen by Hala Essalmawi that ‘in 2018, academics, researchers, librarians, content creators, and library patrons will have very limited knowledge of copyright issues and of the options the system provides, including limitations and exceptions.’³⁸¹ Developed nations, via bilateral, regional or international trade agreements, have tried to put more pressure on developing nations to enforce copyright³⁸² and increase severe penalties on circumventing TPM acts, while most copyright laws in developing countries³⁸³ do not contain any exception that allows the circumventing of TPMs for implementing copyright limitations and

with software so that the program can only be run if the dongle is inserted into the computer’s parallel port. In doing so, the protection method can prevent making copies of the original software. Another smart technology is a ‘worm’ secretly planted into a user’s computer in order to detect efforts to copy the program and erase the copied files. Furthermore, TPMs nowadays are able to permit certain acts, but block some other specific manners. For instance, it enables users to make a single personal copy of a copyright work, but making serial copies can be prevented. It can also allow using a digital form of a copyright work for a limited period of time and after that the use of the file becomes impossible. See more at Attorney-General’s Department, Australian Government, ‘Review of Technological Protection Measure exceptions made under the Copyright Act 1968’ 2

<<http://www.ag.gov.au/RightsAndProtections/IntellectualProperty/CurrentIssuesReformsandReviews/Documents/Guidancematerial-TPMexceptionsreview.pdf>> (retrieved 8th October 2013).

³⁷⁹ Kamiel J Koelman and Natali Helberger, ‘Protection of Technological Measures’ in P Bernt Hugenholtz, *Copyright and Electronic Commerce* (Kluwer Law International, 2000) 167.

³⁸⁰ Lawrence Lessig, *The future of ideas* (House, 2001) 235.

³⁸¹ Hala Essalmawi, ‘Options and Alternatives to Current Copyright Regimes and Practices’ in Gaelle Krikorian and Amy Kapczynski, *Access to Knowledge in the age of Intellectual Property* (Zonebooks, 2010) 627, 628.

³⁸² ACTA, for example, put pressure on developing countries to enforce copyright effectively. This convention will be mentioned further in Chapter Four of the thesis.

³⁸³ A study of implementing technical protection measures (TPMs) in 11 developing countries of the Asian Pacific showed that all surveyed nations grant copyright owners the ability to prevent circumvention of TPMs, but have no exception for circumventing TPM for implementing limitations and exceptions to copyright. See more at Consumer International, ‘*The Report on Copyright Protection*’ (2006) <<http://cr-internationalc.com>>.

exceptions, for example circumvention in the interest of disabled access or long-term preservation. This results in the impossibility of legitimate access reserved by copyright limitations and exceptions due to the utility of TPMs in developing countries, because legitimate users privileged by limitations and exceptions cannot exercise their rights, as they are not allowed to break the digital lock. Hence, Pistorius said that ‘in these countries, the user’s rights to circumvention of technical measures in order to access works were eroded’.³⁸⁴ That is to say, digital technology has created an extra layer of copyright protection that controls the access and use of cultural expressions and that unbalanced copyright is going too far in the digital age.

It is necessary to note that balanced copyright has recently been globally recognised. In the *TRIPS Agreement*, the definitive objective of IP protection is ‘the mutual advantage of producers and users of technological knowledge...conducive to social and economic welfare, and to balance of rights and obligations’.³⁸⁵ The balance is also in correspondence with art 27 of the *Declaration of Human Rights*, in which the right of society is set up in paragraph (1), while the right of the author is protected under paragraph (2) at the same time:

- (1) Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts, and to share in scientific advancement and its benefits.
- (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author.³⁸⁶

The Preambles of both the *WCT* and *WPPT* similarly underscore ‘the need to maintain a balance between the rights of authors (performers and producers of phonograms) and the larger public interest, particularly education, research, and access to information’.³⁸⁷ Similarly, UNESCO noted that state members commit to

³⁸⁴ T Pistorius, ‘Developing countries and copyright in the information age’ (2006) 9 (2) *PER/PEL J.* 150, 154.

³⁸⁵ *Agreement on Trade-Related Aspects of IPRs*, April 15, 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 81 (1994) (hereinafter *TRIPS Agreement*).

³⁸⁶ United Nations, the *Universal Declaration of Human Rights*, Article 27 (10 December 1948) <<http://www.un.org/en/documents/udhr/index.shtml#a27>> (retrieved 22nd November 2012).

³⁸⁷ The *WIPO Copyright Treaty 1996*.

‘ensuring protection of copyright and related rights in the interest of development of contemporary creativity and fair remuneration for creative work, while at the same time upholding a public right of access to culture’.³⁸⁸

It is high time to call for a balance in copyright in developing countries. A balanced copyright system will deal with conflicting interests between the protection of copyright owners and access to knowledge for the public, and between facilitating creativity and sharing the identity of cultures. How can copyright be put into balance? The law simply needs to pay equal attention to both sides: production and access. To accomplish this, copyright ownership needs to encourage creators/innovators in their efforts for production by granting them a temporary monopoly for a specified length of time. However, the protection should not go too far. The law needs to bring sufficient access to knowledge to the public by restricting the monopoly when it conflicts with overriding public interests or the necessity for some members of the public to make a single copy of a work for the non-commercial purpose of education or private use.

Copyright limitations and exceptions stand on the side of access to knowledge – ‘the other half of the social contract’³⁸⁹ that puts copyright into balance. Limitations and exceptions to copyright are those rights provided to users to access cultural materials without prior authorisation of copyright owners. They are sometimes called users’ rights in contrast to authors’ rights.³⁹⁰ They create an open zone for potential innovators to access existing knowledge, fix market failures in the economy, promote education, preserve cultural heritage, encourage freedom of expression, and the efficiency of knowledge flow.³⁹¹ Stewart stated that:

<http://www.wipo.int/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf> and the *WIPO Performances and Phonograms Treaty 1996*

<http://www.wipo.int/export/sites/www/treaties/en/ip/wppt/pdf/trtdocs_wo034.pdf>.

³⁸⁸ UNESCO, ‘Main lines of an action plan for the implementation of the UNESCO Universal Declaration on Cultural Diversity’ (2 November 2001) <http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html> (retrieved 7 October 2014).

³⁸⁹ Patterson and Lindberg, above note 116; Vera Franz, ‘Back to Balance: limitations and exceptions to Copyright’ in Gaele Krikorian and Amykapczynski (eds), *Access to Knowledge in the Age of Intellectual Property* (MIT Press, 2010) 518.

³⁹⁰ Patterson and Lindberg, above note 116.

³⁹¹ This will be justified in the next chapter of the thesis.

The limitations on copyright are necessary to keep the balance between two conflicting public interests: the public interest in rewarding creators and the public interest in the widest dissemination of their works, which is also the interest of the users of such works.³⁹²

In developing countries, exceptions and limitations to copyright are extremely important, as most citizens do not have the resources to purchase expensive knowledge goods. Ironically, the global community has not paid enough attention to them. Despite being stipulated in important agreements,³⁹³ the interpretation of copyright limitations and exceptions has been restricted and become narrower and narrower over time. Recently, the Trans-Pacific Partnership (TPP)³⁹⁴ proposal has even threatened to restrict the scope copyright limitations and exceptions, as ‘the most restrictive three-step language extends the test to exceptions and limitations not currently under the test’.³⁹⁵ Moreover, developing countries, including Vietnam, have not paid enough attention to constructing a proper set of limitations and exceptions to copyright. This is due in part to the fact that such nations were not aware of the benefits of those limitations and exceptions to copyright, while publishers and producers lobbied for strong copyright protection. The rest of this thesis intends to demonstrate the role of copyright limitations and exceptions and how to construct a pragmatic set of limitations and exceptions to copyright to promote innovation and development.

³⁹² S E Stewart, *International Copyright and Neighbouring Rights* (Butterworths, 2nd ed, 1989) para. 4.50 quoted at G Davies, *op. cit.*, at 276, footnote 39.

³⁹³ Copyright limitations and exceptions were first expressed in provisions by the *Berne Convention 1886* and then in its revision the *Paris Act of Berne 1896*. In the beginning of negotiations to build up the *Berne Convention*, it was noted that ‘limits to absolute protection are rightly set by the public interest’. Correspondently, limitations and exceptions were stipulated on the basis of public interest. Therefore, Article 2*bis* (2) is related to limitations and exceptions in reproduction and communication to the public of public addresses, lectures, etc, by the press. Article 9(2) talks about certain exceptions to the reproduction rights, subject to specific condition). Article 10 mentions quotations and use for teaching purposes. Article 10*bis* considers certain uses for reporting of news and the like. Article 11*bis* (2), 13 and the Appendix of the *Paris Act of Berne* talk about compulsory licenses. Significantly, the *Paris Act of Berne* set up the general formula approach in art 9(2), which are commonly referred to as ‘the three-step test’. After that, art 15 of the *Rome Convention*, in art 13 of *TRIPS Agreement*, art 10 of *WCT* and art 16 of *WPPT* adopt and extend the template of the three-step test of the *Berne Convention* as the basis for the application of copyright limitations and exceptions under these treaties. See more details in Chapter Five of this thesis.

³⁹⁴ Trans-Pacific Partnership negotiations undertaken by Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore, US and Vietnam will be a regional free trade agreement if it is signed.

³⁹⁵ Civil Society Groups, ‘A Joint Statement of Civil Society Groups on US and Australia’s TPP Proposal on Exceptions and Limitations’ available at <https://www.efa.org.au/2012/09/04/tpstatement/> (retrieved 18 the November 2013).

In summary, this section has shown that copyright plays the role of ‘drivers of innovative efforts’,³⁹⁶ hence facilitating innovation and growth. However, copyright protection restricts access to knowledge, which is necessary for long-term innovation, growth, and human development. Therefore, ‘the role of copyright in disseminating information and promoting welfare can only be effectively realised when copyright law reflects a balance between the competing interests of protection and access’.³⁹⁷ A balanced approach to copyright enables ordinary people around the world to benefit from the advances of the information age and allows them to generate a vibrant, participatory, and democratic culture. Copyright limitations and exceptions are an essential piece of putting copyright in balance, as they provide users or potential creators with the right to access copyright materials without prior permission from copyright owners. However, limitations and exceptions to copyright are often forgotten when drafting national copyright law, partly due to the lobbying of publishers and producers, and also due to not being recognised for their benefits. The role of copyright limitations and exceptions in promoting innovation and development is demonstrated in the next chapter.

3.6 CONCLUDING REMARKS

This chapter demonstrated the relationship between access to knowledge, innovation, development, and copyright. It indicates that innovation – the driving force of economic growth – is the utility of knowledge in new ways to create added value for the economy; it therefore needs requires access to knowledge for innovative production. In addition, knowledge is a unique resource of human welfare; thus, all citizens demand access to knowledge to enhance their capabilities to live long lives.

Moreover, this chapter illustrated that people are often afraid of creating and sharing their new knowledge, because the nature of knowledge, as a public good, is non-rivalrous and non-excludable. They fear they will receive nothing from their knowledge if it is distributed and it is impossible to stop other people from using it. This impedes innovation and development, as it restricts people from accessing new knowledge and blocks the flow of knowledge. Copyright protection contributes an

³⁹⁶ Giovanni Dosi, Franco Malerba, Giovanni B Ramello and Francesco Silva, ‘Information, appropriability, and the generation of innovative knowledge four decades after Arrow and Nelson: An Introduction’ *Industrial and Corporate Change* (2006) 15, 891.

³⁹⁷ Okediji, above note 53.

external force to encourage authors or innovators to distribute their new knowledge by granting them exclusive rights within a limited time to control or monopolise their work in order to recoup their effort. However, the temporary monopoly of copyright owners over their product prevents the public from accessing the expression of knowledge, as the copyright owner erects intangible walls to touching its expression, such as licences, royalties, technological protection measures, and civil and criminal liabilities. This favouring of protection ignores the needs of the users.

Therefore, this chapter emphasised the need for a balanced copyright system for innovation and development. A balanced copyright system supports access to knowledge by balancing between the rights of owners and users. Limitations and exceptions to copyright are provisions that provide rights for users or the public to access knowledge expression without prior permission of copyright owners. Limitations and exceptions are currently forgotten by law-makers in developing countries, while such nations have an extreme demand for knowledge access in order to further development. This argument provides the foundation for the next chapter on the theory of the role of copyright limitations and exceptions in promoting innovation and development. The next chapter discusses the role of copyright limitations and exceptions, how they are able to open spaces for access to knowledge, and spur innovation and development.

Chapter 4: The Theory of the Role of Copyright Limitations and Exceptions in Facilitating Innovation and Development

There is no unfairness to owners of existing copyrights when some portion of the value of their works is used to subsidise the development of technologies that will 'grow the pie' for themselves and other copyright owners.

Fred von Lohman³⁹⁸

4.1 OVERVIEW

The previous chapter argued that access to knowledge is crucial for innovation and human development. To retain public access to knowledge, a balanced copyright system is necessary. Copyright limitations and exceptions are a vital part of keeping the copyright system in balance. They have occurred and existed due to the public benefit. They restrict the absolute rights of the copyright owner and encourage further innovative creations. This chapter begins with the role of copyright limitations and exceptions in facilitating further innovative activities by affording leeway for potential creators to access knowledge and providing 'start-up capital' which encourages investment into technological sites that contain huge risks in the digital age. Doing so spurs innovation or economic growth. Moreover, limitations and exceptions help to repair market failure that creates barriers for innovation and economic growth.

In addition, copyright limitations and exceptions enhance human capabilities such as learning, play, freedom of expression, and participation. They create more opportunities for citizens to improve their freedom, enjoyment, and liberty in the society, and preserve cultural knowledge and foster cultural diversity by providing the public with access to cultural expressions. Additionally, copyright limitations and exceptions support education, which is vital for human development, by providing

³⁹⁸ Fred von Lohmann, 'Fair Use as Innovation Policy' (2008) 23 (1) *Berkeley Technology Law Journal* 1, 1.

students, teachers, and educational institutions with more access to educational materials without prior permission from the copyright owner.

This chapter is central to the argument justifying the role of copyright limitations and exceptions in promoting innovation and development. It serves to answer the first research question: What is the role of copyright limitations and exceptions in promoting innovation and development? Answering this question is important, as it provides a strong justification to the objective of this thesis to outline recommendations for reforming Vietnamese copyright limitations and exceptions provisions towards encouraging and developing innovation and development.

4.2 COPYRIGHT LIMITATIONS AND EXCEPTIONS PROMOTE INNOVATION AND ECONOMIC GROWTH

Limitations and exceptions to copyright play an important role in promoting knowledge flow, as they make knowledge available to the public for free or at a reasonable price in some circumstances – namely for education, research, criticism, reporting news, reverse engineering, for libraries, and for impaired people. Thus, users find a way out of the deadlock erected by the copyright owner in order to obtain existing knowledge. They are able to lean on copyright limitations and exceptions to reduce input expenses for innovation. This encourages potential users, such as students, amateurs, and researchers, to evolve in innovative activities. Moreover, copyright limitations and exceptions are ‘breathing room’ for technological innovators to create new products, new markets rested on users’ rights, as well as stimulating entrepreneurs to invest in innovators in high-risk technological innovation. This is important for innovation and economic growth in the digital age, where the creations of amateur and disruptive innovations are the main factors contributing added value to the economy. This section seeks justifications to support the point that copyright limitations and exceptions facilitate innovation and development. It aims to strengthen the argument of the thesis that copyright limitations and exceptions can stimulate innovation in developing countries, including Vietnam.

4.2.1 Copyright limitations and exceptions generate leeway for potential creators to access knowledge

Copyright limitations and exceptions leave space for access to knowledge, as they provide access to knowledge expressions without prior permission of the

copyright owner in certain cases, such as research, criticism, study, and archiving. Chapter 2 of the thesis identified that access to knowledge is essential for technological progress, as knowledge is a unique input of innovation. Knowledge of how to move a rock was a milestone for the development of the construction industry and knowledge of how to cure the illnesses of our ancestors was the foundation of the medical industry today.³⁹⁹ More recently, knowledge has been considered the centre stage in the world economy. Although most products exchanged on the routes of international trade are still physical goods, the amount of money charged for these products is mostly for the permission of using the ideas or expressions of innovators. For example, consumers buying iPhones, iMacs or iPads have paid large amounts of remuneration to copyright or patent owners rather than for the cost of the physical materials. Therefore, obtaining access to knowledge in a knowledge economy is a precondition for a person, a business, or a country to survive and grow.⁴⁰⁰ Access to knowledge is strictly controlled by the innovators through copyright protection. However, copyright limitations and exceptions open the door for users to obtain access legally. They allow students access to textbooks and computer software; researchers access to updated knowledge, journalists to use previous articles, and librarians to delivery means by which people can access the knowledge created and accumulated by past generations. Moreover, libraries and archives are able to rest on limitations and exceptions to create back-up copies of knowledge expressions for the purpose of preservation, which is extremely important for greater production. Impaired people have the opportunity to access copyright materials via limitations and exceptions to copyright as well.⁴⁰¹ Parody or satire – humorous creative imitation

³⁹⁹ Christian Nordqvist, 'A History of Medicine: What is Ancient Egyptian Medicine?' (9 August 2012) Medical News Today <<http://www.medicalnewstoday.com/info/medicine/ancient-egyptian-medicine.php>> (retrieved 01 February 2015).

⁴⁰⁰ Danis A Rondinelli, 'Promoting national competitiveness in a globalizing economy: The State's changing roles' United Nations 40 <<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan005782.pdf>> (retrieved 01 February 2015).

⁴⁰¹ Limitations and exceptions in many countries provide privileges for education, libraries or archives, and for impaired people. See more at Kenneth Crews, 'Study on Copyright limitations and exceptions for libraries and archives' WIPO Standing Committee on Copyright and Related Rights SCCR/29/3 (5 November 2014) <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=290457>; Judith Sullivan, 'Study on copyright limitations and exceptions for the visually impaired' WIPO Standing Committee on Copyright and Related Rights SCCR/15/7 (20 February 2007) <www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_7.doc>; Juan Carlos Monroy Rodriguez, 'Study on copyright limitations and exceptions for educational and research activities in Latin America and the Caribbean' WIPO Standing Committee on Copyright and Related Rights SCCR/19/4 (30 November 2009) <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130303>; Raquel

of the original work – has boomed recently, partly because of increasingly eligible access of users to political and social issues via the provisions of limitations and exceptions.⁴⁰² Once again, the rules that ‘nothing comes from zero’ or ‘stand on the giant’s shoulders’ are repeated here to say that copyright limitations and exceptions have provided great opportunities for future innovators to ride on other’s innovations to create new innovations. Innovators, on one side, can harvest their fruit from commercialisation of their intellectual creations, but, on the other side, leave a way for potential innovators to develop and gain added value.

Limitations and exceptions to copyright are even more important in developing countries where access to knowledge is the best way to reduce poverty and shorten the distance to the developed world, because they create an open zone for such nations to gain access. As indicated in Chapter Three, the developing world is increasingly demanding access to advanced knowledge from developed nations for the purpose of developing growth. Unfortunately, their financial budgets are limited,⁴⁰³ while overly-strong copyright protection makes the cost of access via voluntary licencing schemes expensive. It challenges developing countries who are seeking voluntary licencing schemes. Limitations and exceptions to copyright bring more chances for citizens in developing countries to obtain fresh knowledge from overseas. For instance, it allows a person to import and translate cultural work for private use. Furthermore, in the educational sector, it brings about huge opportunities for students, teachers, and educational institutions to make copies and reproduce

Xalabarder, ‘Study on copyright limitations and exceptions for educational and research activities in North America, Europe, Cancasus, Central Asia and Israel’ WIPO Standing Committee on Copyright and Related Rights SCCR/19/4 (05 November 2009)

<http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130393>; Victor Nabhan, ‘Study on limitations and exceptions for copyright for educational purposes in the Arab countries’ WIPO Standing Committee on Copyright and Related Rights SCCR/19/4 (07 October 2009) <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130302>.

⁴⁰² Under the US fair use doctrine and fair dealing doctrine of Australia, the use of the work in a humorous way for the purpose of parody or satire is acceptable. See more at Australian Copyright Council. ‘Parodies, Satire and Jokes’ (February 2012) <www.copyright.org.au/admin/cms.../5948979705265ed38840a5.pdf> (retrieved 1 February 2015); Sally McCausland, ‘New room to lampoon: the new fair dealing exception for parody or satire’ (31 March 2007) Arts law Central of Australia <<http://www.artslaw.com.au/articles/entry/new-room-to-lampoon-the-new-fair-dealing-exception-for-parody-or-satire/>>.

⁴⁰³ Developing countries often confront the problems of a tight financial budget while external debt is increasing over time. The net external debt flowing to developing countries rose 28% in 2013 and trended upward in 2014 and 2015. See World Bank, ‘2015 International Debt Statistics’ (16 December 2014) available at <<http://data.worldbank.org/products/ids>> (retrieved 29 March 2015); World Bank, ‘Global Development Finance: External Debt of Developing countries’ (2012) <http://data.worldbank.org/sites/default/files/gdf_2012.pdf> (retrieved 29 March 2015).

cultural expressions without prior permission of the copyright owner. As a result, more knowledge is spread throughout the country, greater adaption of knowledge is made within local firms, and more innovations result.

4.2.2 Copyright limitations and exceptions provide the ‘start-up capital’ for innovators⁴⁰⁴

More and more technological products today are witnessed as resting on copyright limitations and exceptions to introduce innovative products that enable users to access and reuse copyright works without permission from the copyright owner. Lohmann and Lee emphasised that copyright limitations and exceptions serve as part of the ‘start-up capital’⁴⁰⁵ or ‘breathing room’⁴⁰⁶ for innovators to develop new technological innovations.

Indeed, start-up capital is significantly important for disruptive innovation – the determinant of economic growth in the digital age. According to evolutionary economics, in the new era of the digital environment, rather than sustaining innovation, creative destruction or disruptive innovation is ‘dominant and drives economy growth’.⁴⁰⁷ Clayton Christensen, a prominent economist, in his work ‘The Innovator’s Dilemma’⁴⁰⁸ described new innovations as disruptive innovations, where ‘neither manufacturers nor customers know how or why the products will be used; and hence, do not know what specific features of the product will and will not ultimately be valued’.⁴⁰⁹ This is different from sustaining innovations, which are maintained in most large companies. Sustaining innovations improve products to satisfy existing customers and drive up profit margins for established companies. Incumbent established companies generally dominate the world of sustaining

⁴⁰⁴ This statement was written by von Lohmann, above note 398 at 10. Von Lohmann also used a synonym ‘seed capital’ instead of ‘start-up capital’: see more at Fred von Lohmann, ‘iPods, TiVo and Fair use as Innovation Policy’ (paper presented at the Fordham IP Conference, New York, 31 March – 1 April 2005) 2.

⁴⁰⁵ von Lohmann, above note 398 at 8.

⁴⁰⁶ Edward Lee, ‘Technological Fair Use’ (2010) 83 *Southern California Law Review* 797, 823.

⁴⁰⁷ Schumpeter, above note 12 at 52; Sengupta, above note 193 at 229. This point was discussed in Chapter Three of the thesis.

⁴⁰⁸ Clayton M Christensen, ‘Disruptive Technologies: Catching the Wave’ (1995) 73 (1) *Harvard Business Review* 43; Clayton M Christensen, *The Innovator’s Dilemma: When New Technologies Cause Great Firms to Fail* (Harvard Business School Press, 1997); Clayton M Christensen, *The Innovator’s Solution: Creating and Sustaining Successful Growth* (Harvard Business School Press, 2003); Clayton M Christensen, *Disrupting Class: How Disruptive Innovation Will Change the Way the World Learns* (Harvard Business School Press, 2008); Clayton M Christensen, ‘Meeting the Challenge of Disruptive Change’ (1997) 41 (2) *Harvard Business Review* 77; Clayton M Christensen et al., ‘Disruptive Innovation for Social Change’ (2006) 84 (12) *Harvard Business Review* 94.

⁴⁰⁹ Clayton M Christensen, *Disrupting Class: How Disruptive Innovation Will Change the Way the World Learns* (Harvard Business School Press, 2008) at 178.

innovations and try to respond to the needs of their existing customers. These customers often ask for better versions of existing products rather than completely new technology. Disruptive innovations, in contrast, often result in worse performance, at least in the short term, for most existing customers, although they are generally ‘cheaper, simpler, smaller, and frequently, more convenient to use’.⁴¹⁰ According to Lee and Lohmann, ‘breathing room’ or ‘start-up capital’ is extremely important for the development of disruptive innovations as they are often difficult, even impossible, to predict. Due to this inherent unpredictability, policymakers generally allow ‘breathing room’ for different types of technologies to develop so that society is able to try ‘many different possibilities in the marketplace’.⁴¹¹ Hence, Christensen stated that ‘start-up’ technology companies play an important role in the innovation of the digital age.⁴¹²

Limitations and exceptions to copyright provide ‘start-up capital’ for disruptive innovation. They are the ‘breathing room’ for ‘start-up’ technology companies to launch their innovations and withstand the threat of lawsuits or criminal prosecutions against innovators in relation to copyright infringement. A number of disruptive innovations have been created in recent years based on the rights supported by limitations and exceptions to copyright. First, in the *Sony*⁴¹³ case in 1984, Sony Corp. introduced Sony’s Betamax, a video cassette recorder (VCR)⁴¹⁴ that allowed customers to tape television shows at home for later viewing (known as time-shifting). In response to this technology, several movie studios sued Sony for

⁴¹⁰ Clayton M Christensen, *Disrupting Class: How Disruptive Innovation Will Change the Way the World Learns* (Harvard Business School Press, 2008) at 178.

⁴¹¹ Edward Lee, ‘Technological Fair Use’ (2010) 83 *Southern California Law Review* 797, 824.

⁴¹² According to Christensen, established companies often fail to respond to disruptive innovations, as both internal and external forces encourage them to reject investment in disruptive innovations. Particularly, the market opportunity, at least at the initial stage, is likely to be smaller than the market of established companies. Moreover, there is an uncertainty regarding disruptive innovations. These innovations depend on new customers and markets. It is too difficult to estimate the size and financial returns from disruptive innovation. Frequently, senior managers in established companies are not persuaded by an opportunity that cannot be quantified and analysed. Therefore, large companies choose to ignore disruptive technologies until they become more attractive profit-wise. Disruptive technology, however, eventually overcomes maintained technology to meet the market demand with lower costs. When this happens, the big companies who do not invest in breakthrough technologies are soon left behind. This is, according to Christensen, ‘The dilemma of the innovator’. See more at Clayton M Christensen *Disrupting Class: How Disruptive Innovation Will Change the Way the World Learns* (Harvard Business School Press, 2008) at 178 - 200.

⁴¹³ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 US 417 (1984).

⁴¹⁴ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 US 417 (1984) 420. The Court described Sony’s Betamax as a ‘video tape recorder’ or VTR. This device eventually became commonly known as the ‘video cassette recorder’ (VCR).

copyright infringement. Heated debates took place in the courts, as well as between scholars about the legitimacy of the product. Hollywood movie studios at that time preferred that their existing products—such as laser discs rather than VCRs—be used to distribute their movies. They attempted to ban the VCR on the basis it could cause massive losses in revenue for the Hollywood movie industry. Ultimately, the Supreme Court held that home time-shifting recordings were a permissible fair use and the VCR was definitely lawful because the technology was capable of ‘substantial non-infringing uses’.⁴¹⁵ Lohmann wrote, ‘the fair use of time-shifting provides part of the “start-up capital” for Sony’s Betamax’.⁴¹⁶ Similarly, as the Supreme Court explained in the context of discussing the Sony safe harbour, copyright limitations and exceptions provide ‘the breathing room for innovation and a vigorous commerce’.⁴¹⁷

Similarly, fair use strongly supports Apple’s iPod products as ‘start-up’ capital. iPods, along with iTunes music download software, enable users to make multiple private copies of copyrighted work.⁴¹⁸ Apple celebrated its 15 billionth song downloaded between mid-2003 and June 2011. The rate of growth has been around 4 billion annually since 2009.⁴¹⁹ The impressive number of sales would not be possible if the device was not a fair use enabling technology. In fact, iPods, iPhones, or iPads enable users to make multiple private copies of copyrighted works. Those copies are allowable by format-shifting of the fair use doctrine in the US law. Hence, a customer buys a song from iTunes or copies it from his or her CD collection, the song is then automatically saved in the cloud and can be downloaded by any other devices that have iTunes installed. Lohmann thus concluded that without the pre-existing stock of music with which to fill the iPods and the possibility to make multiple copies of such music, the device would be far less attractive.⁴²⁰

Likewise, Google Book Search (or Google Print) is another new technology launched in late 2004 based on the fair use defence. It allows its users to search the

⁴¹⁵ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 US 417 (1984) 422.

⁴¹⁶ von Lohmann, above note 398 at 13.

⁴¹⁷ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 US 913, 933 (2005).

⁴¹⁸ Apple’s iPods allow their owners to copy music from a CD owned by the consumer to a personal computer using Apple’s iTunes software, then using the same software to make a second copy on the iPod itself. Through this device, multiple copies have been made without the authorisation of the copyright owner. See more at von Lohmann, above note 398 at 4.

⁴¹⁹ Presnikoff, ‘Apple has now sold 15 billion iTunes songs...’ Digital Music News (06/06/2011) <<http://www.digitalmUSEicnews.com/stories/060611itunes15>> (retrieved 10 April 2013).

⁴²⁰ von Lohmann, above note 398 at 7.

text of copyrighted books, sometimes without permission of copyright owners. A number of publishers and authors sued Google for copyright infringement. They feared that this technology would cause them loss of revenue. Google pointed out that users of the search engine do not see the full text of a book unless they get permission. They can only view excerpts called ‘snippets’ of the book that show enough information that users can evaluate whether a given book is indeed of interest.⁴²¹ The reproduction of excerpts of the books can be invoked as fair use (quotation). Notwithstanding the opposite views around this issue still being discussed, and a settlement agreement of stakeholders reached in 2008, Google Book Search now includes over 12 million works that users can search for keywords.⁴²² It is clear that Google Book Search is an extraordinarily valuable tool for the welfare of the public. Electronic Frontier Foundation Fellow Michael Barclay said ‘The fair use doctrine allows for services like Google Book Search – they cause no economic harm and serve the welfare of the public’.⁴²³

That said, if there were no copyright limitations and exceptions – such as the flexible fair use doctrine existing under US copyright law – such disruptive innovations would not have a basis for their existence. Moreover, such technologies can be a key input into the value of new technologies in the future. Therefore, it is possible to say that copyright limitations and exceptions are essential to fertilise and nurture innovations. Lohmann concluded that:

The fair use doctrine sets private copying beyond a copyright owner’s reach to encourage the development of new technologies that will “grow the pie” for both existing and future copyright owners.⁴²⁴

4.2.3 Copyright limitations and exceptions encourage investment and create new markets for technology companies⁴²⁵

Copyright limitations and exceptions encourage entrepreneurs to invest in and create new markets, as they decrease the risk of investment on disruptive innovation.

⁴²¹ *Google Inc v. Author Guild Inc. et al* (U.S. District Court, Southern District of New York, No. 05-08136).

⁴²² Electronic Frontier Foundation (EFF), ‘Google Book Search Case Threatens Librarians’ Access to Information’ (01/08/2012) <<https://www.eff.org/press/releases/google-book-search-case-threatens-librarians-access-information>> (retrieved 11 April 2013).

⁴²³ Electronic Frontier Foundation (EFF), ‘Google Book Search Case Threatens Librarians’ Access to Information’ (01/08/2012) <<https://www.eff.org/press/releases/google-book-search-case-threatens-librarians-access-information>> (retrieved 11 April 2013).

⁴²⁴ von Lohmann, above note 398 at 10.

⁴²⁵ von Lohmann, above note 398 at 7.

Schumpeterian literature concludes that the entrepreneur is the active stimulant in economic growth because the entrepreneur is willing to invest in new innovation to create new products and processes with increasing profits.⁴²⁶ The entrepreneur is an agent that takes risk in trying new ideas and commercialising them in the market. Only successful agents are able to harvest huge profits through a temporary monopoly, and the less successful collapse.⁴²⁷ The dynamic of profits leads the entrepreneur to the investment of innovation. In measuring profit, restricting risk, including the risk of legal litigations, is strictly considered by the entrepreneur. Copyright limitations and exceptions help the entrepreneur to avoid copyright litigation, a substantial potential risk in terms of time and money in legal fights. According to Tim Wu, copyright limitations and exceptions allow investors to decide whether they would like to invest in such a type of innovation or not.⁴²⁸ He uses the *Sony* case as typical evidence. Grounded on a strong belief that VCRs were supported by fair use, Sony invested in the VCRs. Sony Corp. was sued by some copyright owners, but after the Supreme Court ruled in favour of Sony by recognising time-shifting as a fair use, a vast new market for VCRs opened up. Millions of copies were sold and an estimated 86.6% of households in the US had VCRs by 1999. Contrary to Hollywood studios' fears of losing their benefits, major revenue for Hollywood has come from the home video market, such as renting and selling movies and television series. By 1995 more than half of Hollywood's film studios revenue came from the home video market. The VCR was not the death knell of the movie business, instead 'it became arguably its saviour'.⁴²⁹ Not only did it create a new home market, but the spread of VCRs also facilitated the growth of a new market for camcorders and video cameras. Wu argued that the contributory rule of the *Sony* case created a push for investment in new devices such as VCRs, DVRs, and TiVo.⁴³⁰ In addition, Wu said fair use for parody in US copyright law enables parodists to decide independently whether they want to invest in a parody project or not.⁴³¹ Likewise, providing reverse engineering of a copyright computer program for

⁴²⁶ Schumpeter, above note 12 at 55; Sengupta, above note 193 at 69; Nelson and Winter above note 193 at 460; Marshall, above note 223 at 18. This point was noted in the Chapter Two of this thesis.

⁴²⁷ Sengupta, above note 193 at 69.

⁴²⁸ Tim Wu, 'IP, Innovation, and Decentralized Decisions' (2006) 92 (1) *Virginia Law Review* 123, 143; Tim Wu, 'Copyright's Communication Policy' (2004) *Mich. L. Review* 278.

⁴²⁹ Tim Wu, 'IP, Innovation, and Decentralized Decisions' (2006) 92 (1) *Virginia Law Review* 123.

⁴³⁰ Tim Wu, 'IP, Innovation, and Decentralized Decisions' (2006) 92 (1) *Virginia Law Review* 123.

⁴³¹ Tim Wu, 'IP, Innovation, and Decentralized Decisions' (2006) 92 (1) *Virginia Law Review* 123 at 144.

the purpose of study is a limitation and exception under copyright law that encourages computing companies to invest funds for prospective improvers of computer programs.⁴³²

Significantly, an economic study⁴³³ conducted by Josh Lerner showed that decisions on copyright scope, specifically on the application of copyright limitations and exceptions provisions, can have a notable impact on investment for innovation. Lerner tested his hypothesis on cloud computing companies. He found that changes to European copyright laws in recent years have negatively impacted on venture capitalists' investment (VCI) in these businesses. The study indicated that changes toward strict copyright protection and narrowing the scope of copyright limitations and exceptions in Europe significantly declined the VCI in cloud computing. Lerner looked at several important junctures in EU copyright policy: a November 2008 ruling by the Tribunal de Grande Instance de Paris in France, and several courts' rulings regarding Shift.tv and Save.tv cases in Germany 2006. Shift.tv and Save.tv were established in 2005 and 2006 respectively to provide online services that allowed users to select and store television content on servers from which users could download and stream stored programs. Two German television channels, RTL and SAT1, made complaints to the court on the grounds of copyright infringement.⁴³⁴ Two internet service providers justified that they recorded the programs on behalf of their users, and thus their services did not constitute copyright infringement. However, in 2006 German courts ruled against Shift.tv and Save.tv for the infringement of reproduction rights and retransmission rights. After the 2006 German courts' judgments, statistics indicate that VCI in Germany in cloud computing companies declined an average of 0.5 million per quarter and approximately \$3 million in total between 2006 and 2008.⁴³⁵ In July 2011, the Dresden Appeals Court held in favour of Save.tv on the ground that Save.tv's customers themselves created an automated recording process to privately copy television programs (an exception

⁴³² Tim Wu, 'IP, Innovation, and Decentralized Decisions' (2006) 92 (1) *Virginia Law Review* 123 at 145.

⁴³³ Josh Lerner, 'The Impact of Copyright Policy Changes in France and Germany on Venture Capital Investment in Cloud Computing Companies' (Working Paper, the Computers and Communication Industry Association, 2012).

⁴³⁴ There were three lawsuits: SAT1 v. Shift.tv; RTL v. Shift.tv; RTL v. Save.tv. IRIS Legal Observations of the European Audio-visual Observatory, "DPMA Decides that VG Media Does Not Need to Grant Rights to Operate an Online Video Recorder," 2011, accessed through <<http://merlin.obs.coe.int/iris/2011/1/article22.en.html>> (retrieved 23 January 2014).

⁴³⁵ Lerner, above note 433 at 17.

under German law); thus, Save.tv was not liable for infringement of reproduction right. However, the prospect of these businesses is no more optimistic than when the court concluded that Save.tv breached the right of rebroadcasting under the broadcasting law and Save.tv was required to apply for a licence for rebroadcasting from RTL. Noticeably, the court was embarrassed to clarify this point. Commentators are doubtful about the healthy viability of cloud computing companies due to their legal uncertainty.⁴³⁶ At the same time, in France in 2008, Wizzgo launched the first online DVR platform that allowed customers to view recorded copies of programs broadcast on television channels, as long as they requested that the show be recorded before the programs started.⁴³⁷ In response, television broadcast companies and copyright holders sued Wizzgo for copyright infringement. Wizzgo argued that its technological platform fell under two exceptions under French copyright law: transience and privacy copying.⁴³⁸ The Tribunal de Grande Instance de Paris disagreed with this justification and prohibited Wizzgo from providing this service to its customers and awarded compensation damages of more than €440,000 for copyright infringement.⁴³⁹ The court judgement resulted in an immediate cessation of other French online DVR platforms. Through analyses of historical investment figures, Lerner showed that there was a decline of \$4.6 million in VCI in France per quarter after the Wizzgo ruling and approximately \$16 million in total for 2009 and 2010.⁴⁴⁰ Likewise, cloud computing investment in Europe dropped 1.85 percent in the period of 2009 and 2010.⁴⁴¹ Similarly, Germany suffered a reduction of \$2.8 million in VCI per quarter between 2008 and 2010. French and German VCI lost \$87 million in total and \$269.7 million in traditional R&D investment after these rulings came through at the end of 2010.⁴⁴² That is to say, decisions about the application of copyright limitations and exceptions' rules can have a significant influence on investment into the innovation of technological

⁴³⁶ International Law Office, 'Federal Court Rules on Internet-Based Video Recording' (11 June 2009) <<http://www.internationallawoffice.com/newsletters/detail.aspx?g=a3b4f236-0844-4890-8a9c-2801a77792d8&redir=1>>.

⁴³⁷ *Metropole Television v. Wizzgo* (November 2008) analysed by Josh Lerner, above note 433 at 2.

⁴³⁸ Article L122-5 (1) (2) and (4) of *IP Code 2014* (consolidated as of 22 December 2014).

⁴³⁹ International Law Office, 'Rise and Fall of Online Digital Video Recorders' (19 February 2009) accessed through <<http://www.internationallawoffice.com/newsletters/detail.aspx?g=a08cc455-b5ae-42d4-881dfa85fc7c3a53>> (retrieved 23 April 2014).

⁴⁴⁰ Lerner, above note 433 at 15.

⁴⁴¹ Lerner, above note 433 at 15.

⁴⁴² Lerner, above note 433 at 26.

copyright related industry. The decline of VCI coincides with the decline of innovations in the field, as well as ceasing the additional value and wealth of the field contributions towards the economy.

4.2.4 Copyright limitations and exceptions ameliorate market failure

Copyright limitations and exceptions contribute to repairing market failures, which may prevent people from obtaining knowledge for innovative creativities. Market failure can best be described in cases where market conditions make bargaining between individual copyright owners of copyrighted material and users impossible or impractical.⁴⁴³ According to Wendy J Gordon, market failures include market barriers, externalities, and anti-dissemination motives.⁴⁴⁴ She also described market failures as technical failures.⁴⁴⁵ This might occur for one of two reasons. First, it might be prohibitively expensive for a user to negotiate permission with a copyright owner (transaction costs are too high). Second, it might be impossible to reach an agreement because the user's valuation of use does not represent its true social value (externalities exist).⁴⁴⁶ General speaking, copyright law creates property interests to encourage creators, distributors, and the public to engage in market transactions that will result in the creation and distribution of creative works. Market failures unfortunately prevent this mechanism from efficiently maximising social welfare. In such instances, economic efficiency demands that alternate ways be found to make up for the absence of negotiations between copyright owners and users, and to compensate for the unenforceability of the exclusive rights for unauthorised use of works.

Copyright limitations and exceptions are an efficient mechanism for adjusting copyright's market failure,⁴⁴⁷ which is beneficial for greater production and economic growth. Statutory/compulsory licences, for example, have been seen as a means of making intellectual works available by reducing some transaction costs associated with obtaining permission to use copyright materials. This is because

⁴⁴³ Lucie Guibault, 'Discussion paper on the question of exceptions to and limitations on copyright and neighbouring rights in the digital era' (1998) Steering Committee on the Mass Media <<http://www.ivir.nl/publications/guibault/final-report.pdf>> (retrieved 25 March 2013).

⁴⁴⁴ Wendy J Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessor' (1982) *Columbia Law Review* 82 1600, 1627-1635.

⁴⁴⁵ Wendy J Gordon, 'Market Failure and IP: A Response to Professor Lunney' (2002) *Boston University Law Review* 1031, 1037.

⁴⁴⁶ Gordon, above note 443 at 1614; Robin A Moore, 'Fair Use and Innovation Policy' (2007) 82 *New York University Law Review* 944, 946.

⁴⁴⁷ Brian Fitzgerald and Anne Fitzgerald, above note 359 at 183.

statutory licences force copyright owners to permit the use of their works under legislatively set prices and restrictions on use, rather than allowing copyright owners to negotiate licensing terms for the use of their works. It seems to resolve high cost transactions, as well as time-consuming voluntary licensing. Therefore, it supposedly addresses the market failure.⁴⁴⁸

Moreover, the market failure approach is a basis for limitations and exceptions, such as personal use privileges in the pre-digital age.⁴⁴⁹ In fact, controlling the myriad of individual uses to make copies for personal use at that time was extremely difficult.⁴⁵⁰ Moreover, the licensing scheme exposes impracticality, as it is highly expensive for private uses. For example, in 1984 in the *Sony* case,⁴⁵¹ the Supreme Court of the US ruled that the home-taping of a copyrighted television broadcast for the purposes of time-shifting constituted fair use under the *Copyright Act 1976*. Economic and legal commentators have justified this decision in term of market failure. Gordon argued that market failure had to account to justify *Sony*'s fair use, because high transaction costs involved in negotiating individual time-shifting licences would inevitably exceed the potential gains in trade available.⁴⁵² As a result, the market for time-shifting licences would fail, justifying a finding of fair use.

Furthermore, regarding parody and satire, it is impossible to obtain a copyright owner's permission when the parodist would copy the works to criticise, parody, or

⁴⁴⁸ While it is commonly agreed among scholars and policy-makers that statutory licences bridge market failure, Professor Merges criticised statutory licensing schemes in the digital agenda, claiming that they involve significant influence costs that make them more expensive as a mechanism for setting price. Private negotiation is much cheaper and more flexible over the long term. He argued that markets for digitised works do not suffer from market failure. The internet has reduced the transaction costs that once served as a key rationale for compulsory licensing. See more at Robert P Merges, 'Compulsory Licensing vs. The Three "Golden Oldies" Property Rights, Contracts, and Markets' Cato Institute, Cato Policy Analysis No. 508 (Jan. 15, 2004) <<http://www.cato.org/pubs/pas/pa-508es.html>> (retrieved 25 March 2013).

⁴⁴⁹ Senfleben, 'The three-step test revisited: How to use the test's flexibility in national copyright law' (2014) 29 (3) *AM. U. INT'L L. REV.* 581, 583 at 3; Gordon, above note 444 at 1649. In fact, academics have agreed that as copyright works have moved toward interactive digital distribution, the market failure approach for limitations and exceptions has reduced its role. The reason is that with interactive digital and its association with digital rights management technologies, transaction costs associated with licensing particular uses, in theory, can be dramatically decreased. A copyright owner can build fees for particular uses into copyright technologies and thereby eliminate the potential for high transaction costs based on market failure. Scholars, then, contend that private copying privileges are nowadays best justified by the freedom of expression and the right of privacy. See more at Raymond Shih Ray Ku, 'Consumers and Creative Destruction: Fair Use Beyond Market Failure' (2003) 18 *Berkeley Technology Law Journal* 539, 564; Glynn S Lunney, 'Fair Use and Market Failure: Sony Revisited' (2002) 82 *Boston University Law Review* 975, 991.

⁴⁵⁰ Senfleben, above note 449 at 31.

⁴⁵¹ *Universal City Studios, Inc. v. Sony Corp* 464 U.S. 417 (1984).

⁴⁵² Gordon above note 444 at 1037 cited by Lunney, above note 449 at 985.

lampoon them.⁴⁵³ The copyright owners are unlikely to give permission to critics and parodists. In other words, the copyright owners are unwilling to sell or license their works, even when potential buyers want to pay them a high price. The market presents malfunction in this case as well. Therefore, Wendy J Gordon said, ‘it is appropriate to give a parodist – a disappointed licensee – the liberty to copy for free on the grounds that the owner would not authorise him to do so’.⁴⁵⁴

In summary, this section has shown that copyright limitations and exceptions allow users to free ride on the shoulders of copyright owners to obtain existing knowledge in order to create new knowledge. Moreover, limitations and exceptions to copyright generate ‘breathing room’ or ‘start-up capital’ for firms to create new technological products that provide copyright users with useful tools or mechanisms to effectively access cultural works. They also encourage firms to invest, commercialise new products or processes, and create new markets for the economy. Furthermore, they fix market failures in order to efficiently maximise social welfare. Doing so generates more added value for the economy. This section also indicates that flexible fair use provides breathing room for creators to generate more innovations in the future. Flexible fair use should be adopted by Vietnam when considering how to facilitate innovation for the purpose of economic growth. Thus, this section justifies the first research question on the role of copyright limitations and exceptions in promoting innovation.

4.3 COPYRIGHT LIMITATIONS AND EXCEPTIONS FOSTER HUMAN DEVELOPMENT

This section examines the role of copyright limitations and exceptions in enhancing human development. It argues that copyright limitations and exceptions are important in determining the forms and nature of public access to cultural works for the purpose of human development.⁴⁵⁵ They are safeguards for freedom of expression, promoting cultural diversity, helping to preserve cultural knowledge, and facilitating education. This section provides concrete justification for the role of copyright limitations and exceptions for development.

⁴⁵³ Wendy J Gordon, ‘Excuse and Justification in the law of Fair Use: transaction costs have always been only part of the story’ (2003) 50 *Journal of the Copyright Society of the USA* 149, 159.

⁴⁵⁴ *Ibid* 160.

⁴⁵⁵ Neil Weinstock Netanel, ‘Copyright and a Democratic Civil Society’ (1996) 106 *Yale Law Journal* 283, 346.

4.3.1 Copyright limitations and exceptions improve democracy in society.⁴⁵⁶

A democratic civil society is the goal of every country where its citizens are able to engage in any discussion of political, social, economic, and environmental issues. This type of society enhances the human capability to control one's environment.⁴⁵⁷ In order to address and strengthen democracy, freedom of expression in the community and the efficient flow of knowledge must be supported,⁴⁵⁸ because freedom of expression is a 'cornerstone of democracy'.⁴⁵⁹ It strengthens 'social progress and ensures individual self-fulfilment',⁴⁶⁰ and establishes 'norms and standards that form the basis of our democratic society'.⁴⁶¹ Freedom of expression has significantly contributed to the achievement of human success in the fight against racism, anti-Semitism, islamophobia, homophobia, and other forms of discrimination and intolerance,⁴⁶² as freedom of expression allows for the freedom to communicate.⁴⁶³ It provides every citizen with the capability to express herself/himself by any means without prior restraint. It embraces the freedom of gathering and imparts information to shape ones' opinions and beliefs. It considers the possibility to seek, gather, and disseminate information.⁴⁶⁴ It is regarded as a human liberty of a democratic society⁴⁶⁵ by the *Universal Declaration of Human Rights*:

⁴⁵⁶ Netanel argued that copyright limitations and exceptions support democracy in society. See more at Netanel, above note 318.

⁴⁵⁷ This is one of 10 central capabilities pointed out by Nussbaum. See more at Nussbaum, above note 19 at 20.

⁴⁵⁸ Netanel, above note 318 at 346.

⁴⁵⁹ European Union Agency for Fundamental Rights, 'Freedom of Expression, a cornerstone of democracy – listening and communicating in a diverse Europe' (1st Fundamental Rights Conference, Paris, 8-9 December 2008) 5.

⁴⁶⁰ Lucie Guibault, 'The nature and scope of limitations and exceptions to copyright and neighbouring rights with regard to general interest missions for the transmission of knowledge: prospects for their adaptation to the digital environment' (2003) UNESCO 5

<<http://unesdoc.unesco.org/images/0013/001396/139671e.pdf>> (retrieved 24 January 2014).

⁴⁶¹ European Union Agency for Fundamental Rights, 'Freedom of Expression, a cornerstone of democracy – listening and communicating in a diverse Europe' (1st Fundamental Rights Conference, Paris, 8-9 December 2008) 5.

⁴⁶² Ibid.

⁴⁶³ Ibid.

⁴⁶⁴ UNESCO, 'The ABC of copyright' (2010) 48

<https://webcache.googleusercontent.com/search?q=cache:NJTrZQ-YAB4J:http://www.unesco.org/fileadmin/MULTIMEDIA/HQ/CLT/diversity/pdf/WAPO/ABC_Copyright_en.pdf%2Bcopyright+limitations+and+human+development&hl=en&gbv=2&ct=clnk#44> (retrieved on 28 March 2013).

⁴⁶⁵ Senftleben, above note 449 at 24; Michael Rushton, 'Copyright and freedom of expression: an economic analysis' in Ruth Towse (eds), *Copyright in the Culture Industry* (Edward Elgar, 2002) 52. Guibault, above note 460 at 5.

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference, and to seek, receive, and impart information and ideas through any media and regardless of frontier.⁴⁶⁶

In the 1970s, prominent copyright scholars, Goldstein⁴⁶⁷, Nimmer⁴⁶⁸, Sobel⁴⁶⁹ and Denicola⁴⁷⁰ recognised the potential conflict between copyright and freedom of speech. They noted that the recognition and exercise of exclusive rights of copyright owners on works imposed a burden on the freedom of expression of those who wished to use copyright works to convey their own message and on the right to information of those who simply wished to use the information and ideas contained in copyright material. This is because certain expressions may be a part of a copyright work, and therefore nobody else may use these expressions without the consent of the copyright owner. On the other hand, freedom of expression seems to require free participation in all forms of expression. It need not merely be a person's idea, but also his/her form of expression in order to effectively report or criticise the mood, tone, or nuances of an address.⁴⁷¹ Pamela Samuelson stated, 'copyright is being asserted to suppress free speech or expression'.⁴⁷² It is suggested that the reconciliation of copyright with freedom of speech requires a balance between the absolute forms of those rights.

To strike the balance in the idea-expression dichotomy, copyright limitations and exceptions are seen as the most important mechanism to balance copyright and freedom of expression interests, as they allow users to make certain uses of copyright work in their expressions under certain conditions. Under the *Berne Convention*, art 10bis (2) allows the free use of literary or artistic works seen or heard in the course of a current event for the purpose of reporting the event. In addition, in art 2bis(2), lectures, addresses, and other works of the same nature, which are delivered in public, may be freely reproduced by the press, broadcast, and communicated to the

⁴⁶⁶ *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), Article 9.

⁴⁶⁷ Paul Goldstein, 'Copyright and the first amendment' (1970) 70 (6) *Columbia Law Review* 983, 990.

⁴⁶⁸ Melville B Nimmer, 'Does copyright abridge the first amendment guarantees of free speech and press?' (1970) 17 *UCLA Law Review* 1180, 1180 - 1204.

⁴⁶⁹ Lionel S Sobel, 'Copyright and the First Amendment: a gathering storm?' (1971) 19 *ASCAP Copyright Law Symposium* 43, 43 - 80.

⁴⁷⁰ Robert C Denicola, 'Copyright and free speech: constitutional limitations on the protection of expression' (1979) 67 *California Law Review* 283, 283 - 316.

⁴⁷¹ Guibault, above note 460 at 6.

⁴⁷² Pamela Samuelson, 'Unbundling fair use' (2009) 77 *Fordham Law Review* 2537, 2547.

public. Political speeches and speeches delivered in the course of legal proceedings are excluded from the protection granted by the *Berne Convention* under art 2bis (1). There are also numerous limitations and exceptions to copyright introduced into national legislation for the promotion of freedom of expression by providing for the free flow of information and expressions.

Among copyright limitations and exceptions ensuring freedom of expression, the right to quote and the right to reproduce works for the purpose of parody or satire are important. The right to quote is the most important exception to safeguard freedom of expression. A person has a right to ‘make quotations from a work when it has already been lawfully made available to the public’⁴⁷³ for purposes of scientific, critical, information, education, judicial or political, and even entertainment purposes⁴⁷⁴ as long as ‘the quotation is compatible with fair practice’⁴⁷⁵, and the author of the work is credited and the source of the work is given in the quotation. Free quotations of copyright works under certain conditions guarantee citizens the ability to exercise their rights to gather and impart information to shape their opinion. For example, without quotation rights, it is difficult, even impossible, for citizens to express their opinions on political and social issues. An Australian citizen cannot say ‘Tony Abbott said “blah blah”. I agree/disagree with this/that policy’, because Tony Abbott’s speech might be copyrightable; therefore, without the right to quote, people cannot exercise their freedom of expression. Additionally, the right to reproduce works for the purposes of parody or satire is important for freedom of expression. Parody or satire is a ‘humorous exaggerated imitation of an author, work, style’,⁴⁷⁶ so it not only contains ‘entertainment value, but also serves a critical function, pointing out human imperfections and the ironies of our existence’.⁴⁷⁷ Stimulating the production of parody has social value because it encourages the freedom of expression via humorous reflection of human lives in order to improve imperfections in society. That is to say, limitations and exceptions constructed for the freedom of expression create space for the dissemination of knowledge within the public. They ensure information diversity is not stifled by excessive copyright protection. In other

⁴⁷³ Article 10 (1) of the *Berne Convention*. The right to quote is the mandatory limitation under the *Berne*, occurring in almost all nations.

⁴⁷⁴ Sam Ricketson, *Berne Convention for the Protection of Literary and Artistic Works 1886-1986* (Kluwer, 1987) 492.

⁴⁷⁵ Article 10(1) of the *Berne Convention*.

⁴⁷⁶ Parody, *Oxford Dictionary of Current English* (Oxford University Press, 1993) 648.

⁴⁷⁷ Guibault, above note 460 at 9.

words, they make the flow of information efficient and information becomes widespread. As a result, the efficient flow of information empowers civic engagement in a democratic civil society.

4.3.2 Copyright limitations and exceptions preserve cultural heritage and promote cultural diversity

Cultural heritage refers to items such as works of art, literature, music, cultural achievements, and customs that have been passed on from earlier generations to the present generation. The preservation of cultural heritage is vital for our present and future human development. John Gilchrist explained that:

The past is a part of the US. It is inherent in all artistic, social, economic, scientific, and intellectual development. It is important that future generations have access to, and understand, the past, to better understand themselves and to better deal with the future. In cultures based on written records, the greater proportion of material which is not preserved, the less likely that value will be respected and promoted.⁴⁷⁸

Copyright limitations and exceptions contribute to preserving cultural heritage, as they support a sharing culture, as well as allowing some organisations to store cultural work for future generations. Indeed, cultural preservation depends on sharing culture within society. According to UNESCO, culture is ‘dialogue, the exchange of ideas and experience, and the appreciation of other values and traditions; it withers and dies in isolation’.⁴⁷⁹ Likewise, Mahatma Gandhi said that ‘No culture can live, if it attempts to be exclusive’.⁴⁸⁰ Copyright limitations and exceptions give the public, particularly teachers, students, researchers, and disabled people a way to access cultural expressions for free in order to use, experiment, and reuse them. In doing so, existing cultural knowledge is widely disseminated. More importantly, in many nations, copyright limitations and exceptions support libraries, archives, and museums to access cultural work and make copies – both in physical and digital form – of copyright works for archiving and preservation when such works are part of a permanent collection and it is not reasonably practicable to purchase a

⁴⁷⁸ John Gilchrist, ‘Copyright deposit, legal deposit or library deposit? The Government’s role as preserver of copyright material’ (2005) 5 *Queensland University of Technology Law and Justice Journal* 177, 193.

⁴⁷⁹ UNESCO, ‘Mexico City Declaration on Cultural Policies World Conferences on Cultural Policy’ (26 July – 6 August 1982) available at http://portal.unesco.org/culture/en/files/12762/11295421661mexico_en.pdf/mexico_en.pdf (retrieved 20 October 2014)

⁴⁸⁰ Mahatma Gandhi said this about Indian culture in a speech of a conference at Allahabad on 5 April 1936.

replacement.⁴⁸¹ Moreover, libraries and archives are able to copy electronic materials, reproduce hard-copy materials in electronic form, and communicate electronic material forming part of the library's and archive's collection.⁴⁸² Therefore, nowadays, libraries have rich repositories of historically and culturally significant collections. Without copyright limitations and exceptions libraries could not copy or digitalise a damaged work if it was still protected by copyright. As a result, this cultural knowledge heritage would inevitably be lost to future generations.

In addition, copyright limitations and exceptions can encourage cultural diversity by facilitating the dissemination of knowledge. Academics agree that broad copyright protection may diminish cultural diversity.⁴⁸³ Shur-Ofry argued that strong copyright protection negatively impacts on the 'variety of works created and distributed', as it discourages potential creators from using existing cultural works to add new elements to old issues.⁴⁸⁴ Moreover, a number of cultural works attract public attention, but copyright 'feeds the beast'⁴⁸⁵ of mass media by enabling media companies to invest enormous amounts in marketing of commercial, formulaic works, thus encouraging 'cultural lock-in on mass media hits'.⁴⁸⁶ Shur-Ofry emphasised that tight copyright protection assists the domination of mass media corporations and leaves no room for other works. As a result, copyright contributes to 'the enslavement of the masses to mass-popular culture, as well as to their disregard for other culture'.⁴⁸⁷ He then suggested that reducing copyright protection would 'open the bottleneck and weaken the domination of formulaic works'.⁴⁸⁸ As a result, more diverse works would receive more public attention. However, he quickly

⁴⁸¹ For example, in Australia this limitation is stipulated under ss 48A, 104A, 51, 110A, 51AA, 51A, 110B200AB of the *Copyright Act 1968* (Cth).

⁴⁸² *Copyright Amendment (Digital Agenda) Act 2000*, Act No.110 of 2000.

⁴⁸³ Netanel, above note 318 at 38-40; Michael Shur-Ofry, 'Copyright, complexity, and cultural diversity: a skeptic's view' in *Transnational culture in the Internet age* (Edward Elgar Publishing, 2012) 204; Mark S Nadel, 'How current copyright law discourages creative output: The overlooked impact of marketing' (2004) 19 *Berkley Technology Law Journal* 785; Guy Pessach, 'Copyright Law as a Silencing Restriction on Non-infringing Materials: Unveiling the Scope of Copyright's Diversity Externalities' (2002-2003) 76 *California Law Review* 1067; Niva Elkin-Koren, 'It is all about control: Rethinking copyright in new information landscape' in Niva Elkin-Koren and Neil Weinstock Netanel (eds), *The Commodification of Information* (Springer, 2002) 102-05.

⁴⁸⁴ Shur-Ofry, above note 483 at 210.

⁴⁸⁵ Shur-Ofry, above note 483 at 205.

⁴⁸⁶ Shur-Ofry, above note 483 at 210-211; Pessach, above note 483 at 1067.

⁴⁸⁷ Shur-Ofry, above note 483 at 210-211.

⁴⁸⁸ Shur-Ofry, above note 483 at 205.

gave up that idea because it was impractical.⁴⁸⁹ Shur-Ofry ultimately concluded that limitations to copyright ‘would increase cultural diversity’.⁴⁹⁰ Similarly, Netanel recognised that expressive diversity requires ample opportunity for the creation and dissemination of ‘oppositional expression’ that directly challenges mainstream culture and popular works.⁴⁹¹ Copyright protection tends to impede oppositional expression. Oppositional speakers are often unable to acquire copyright permission from mainstream speakers, as oppositional speakers often target iconic copyright works or use such works in ways that run counter to copyright holder’s views. For example, Alice Randal is an oppositional writer who wrote *The Wind Done Gone*, a parody of Margaret Mitchell’s famous novel *Gone With the Wind*. Her novel made unpopular political statements. Oppositional speakers like Randal are ‘crucial elements of expression diversity’.⁴⁹² She was not able to receive permission from Margaret Mitchell and was subject to a copyright-infringement lawsuit from the publisher of *Gone With The Wind* in 2001.⁴⁹³ Netanel finally came to the same conclusion that limitations and exceptions to copyright facilitate cultural diversity.⁴⁹⁴ There are various copyright limitations and exceptions related to the right of use with regard to the freedom of expression and dissemination of knowledge. They allow all people, rich and poor, from the north or south, white or black, to participate in the various sources of culture and share culture globally. Limitation and exceptions for the right of use for learning and researching, criticism, parody, and satire assist future generations to lean on the rich cultural reservoir rooted from older generations to create new cultural activities. Hence, in the lawsuit between Alice Randal and Margaret Mitchell, the US Court of Appeal held that *The Wind Done Gone* is a parody pursuant to the provision of the fair use defence.⁴⁹⁵ Solomon Linda also relied on American jazz to create his musical tunes. George Weiss wrote the song ‘The Lion Sleeps Tonight’ basing on the song ‘Wimoweh’ by Paul Campbell, but ‘Wimoweh’ turned out to be created from African folklore.⁴⁹⁶ All such cultural

⁴⁸⁹ In fact, copyright protection has been stronger and stronger over time. See more at Chapter Two of the thesis.

⁴⁹⁰ Shur-Ofry, above note 483 at 205.

⁴⁹¹ Netanel, above note 318 at 38.

⁴⁹² Netanel, above note 318 at 41.

⁴⁹³ See more at Kenneth N Gilpin, ‘Doubt is Raised on Lawsuit on The Wind Done Gone’ (11 October 2001) *The New York Times* <<http://www.nytimes.com/2001/10/11/business/doubt-is-raised-on-lawsuit-on-the-wind-done-gone.html>> (retrieved 14 October 2014).

⁴⁹⁴ Netanel, above note 318 at 42.

⁴⁹⁵ The US Court of Appeal in Atlanta (11th Cir.) 2001.

⁴⁹⁶ Sunder, above note 52 at 95.

works again enrich common cultural heritage, as well as growing cultural diversity. Therefore, Madhavi Sunder envisages that such ‘cultural activities are crucial to human flourishing’.⁴⁹⁷

4.3.3 Copyright limitations and exceptions support education

Education, in every sense, is one of the important elements for development. It is recognised as the key to achieving many development goals. It empowers people to develop personal skills and behaviours, as well as a sense of dignity.⁴⁹⁸ It enriches people’s knowledge and understanding of the world. It improves the quality of their lives and benefits every individual and the society.⁴⁹⁹ Moreover, it is a human right, as well as an indispensable means to realise other human rights, according to the United Nations.⁵⁰⁰ Thus, education plays a crucial role in promoting people’s creativity and social progress. In many developing countries, such as China, India, South Korea, and Vietnam, education is the priority for developing programs.⁵⁰¹

Copyright limitations and exceptions support education by allowing students, as well as educational institutions, to obtain knowledge without prior permission from copyright owners. From the *Statute of Anne 1709*, the encouragement of learning and dissemination of knowledge as a means to enhance the general welfare have been the chief goals behind the granting of exclusive rights to authors.⁵⁰² To implement this goal, a number of limitations and exceptions are established to carry out the government’s information policy of dissemination of knowledge and information among the members of society.⁵⁰³ First of all, there are limitations and exceptions for anybody to quote excerpts of cultural expression for the purpose of learning or criticism. This helps learners to achieve knowledge and improve their skills, which are essential for their lives. Moreover, privileges in favour of schools, universities, other educational institutions, public libraries, archives, and

⁴⁹⁷ Sunder, above note 52 at 90.

⁴⁹⁸ *International Covenant of Economic, Social and Cultural Rights* (1966), 993 U.N.T.S No. 03.

⁴⁹⁹ İlhan Öztürk, ‘The role of education in economic development: a theoretical perspective’ (2001) 23 (1) *Journal of Rural Development and Administration* 39, 39.

⁵⁰⁰ General Comments NO. 13, The right to education (Article 13 of the Covenant) in UN Doc. E/2000/22, Report of the Committee, Social and Cultural Rights, Twenty-first session, 1999, 112-127/

⁵⁰¹ Susan Isiko Strba, *International Copyright Law and Access to Education in Developing Countries* (Brill, 2012) 26.

⁵⁰² *The Statute of Anne 1709*, Preamble.

⁵⁰³ Within the international framework, art 10(2) of the *Berne Convention* for the Protection of Literary and Artistic Works provides a provision called the ‘illustration for teaching’. This provision opens potential policy space for signatory nations to mandate access to educational materials for development needs. See more at art 10(2) of the *Berne Convention*.

handicapped persons are those limitations and exceptions encouraging the spread of knowledge and information within the educational sector. Sustained access to educational knowledge is critical to long-term improvements in productivity, preventative health care, the empowerment of women, the reduction of inter-generation cycles of poverty, and reductions in inequality.⁵⁰⁴ More importantly, information is currently converted into the raw material of economic activity in order to create wealth. There is no doubt that access to a broad and diverse supply of information is extremely important for the citizens of society.⁵⁰⁵ Dissemination, therefore, is a public good.⁵⁰⁶ It is beneficial for both individuals and social growth. It enables individuals in society to understand, learn, and express.

4.3.4 Copyright limitations and exceptions improve human play and enjoyment

Copyright limitations and exceptions improve people's play and joy, because they create open zones for users to access knowledge for creative play. The previous chapter identified that creative play is an important part of the progress of human beings, as it satisfies human desires to adjust innovation to suit their own special needs. It promotes human's emotions and senses.⁵⁰⁷ The right to quote, parody or satire, reverse engineering, personal use, criticism, comment, and news reporting is included in copyright limitations and exceptions and introduces open space for users to enjoy the freedom of creative play. Therefore, anyone can take portions of pre-existing text, images, music, videos or movies in order to remix, mash-up, or create lip-synching videos to make their own versions for joy and play. A significant amount of users have produced or recorded funny posters, texts, music, and videos on the internet.⁵⁰⁸ For example, numerous remix versions of the Titanic movie posted on YouTube were taken from samples of the Titanic movie.⁵⁰⁹

⁵⁰⁴ Consortium for Research on Educational Access, Transitions and Equity (CREATE), 'Why access to education is important' <<http://www.create-rpc.org/about/why/>> (retrieved 22 April 2013).

⁵⁰⁵ P Lyman, 'The Article 2B Debate and the Sociology of the Information Age' (1998) 13 *Berkeley Technology Law Journal* 1064, 1069; Senftleben above note 448 at 30.

⁵⁰⁶ Benedict Atkinson and Brian Fitzgerald, 'Copyright as an Instrument of Information Flow and Dissemination: the case of *ICE TV Pty Ltd v. Nine Network Australia Pty Ltd*' (2008) <<http://eprints.qut.edu.au/15208/1/15208.pdf>> (retrieved 21 March 2013).

⁵⁰⁷ See more in Chapter Three of this thesis.

⁵⁰⁸ Millions of remixing works can be found on Facebook and YouTube. See www.facebook.com, www.youtube.com.

⁵⁰⁹ For example, Max Fero, 'My Heart Will Go on (Dance Remix)' YouTube, <<https://www.youtube.com/watch?v=WGnvW799brc>>; SriTube89, Titanic Best Remix Ever, YouTube <<https://www.youtube.com/watch?v=b3K0yaOxxEc>>; Ryoungjohn85, 'Titanic II if Jack Had Lived' YouTube <<https://www.youtube.com/watch?v=u7yGrD7m62g>> (retrieved 30 March 2015).

Furthermore, copyright limitations and exceptions help users to enjoy and get more social value from copyright works by using new technologies based on limitations and exceptions provisions. Technologies based on fair use such as VCRs, iPods, and TiVo have helped innovators to earn billions of dollars in revenue. At the same time, they bring users more choice for enjoying copyright works without additional payment or permission. Digital recorders such as VCRs, DVRs, and iPods have made it possible for billions of busy users worldwide to record television programs for later viewing (time-shifting), for viewing in multiple formats, or on multiple devices. A survey conducted by the Nielsen rating service in the US showed that approximately 9.2 million viewers watch live television programs, while nearly 5 million people use DVR or TiVo to watch them later. According to the same report, 60% of all households reported watching at least 1 hour of DVR recorded programs per day.⁵¹⁰ Clearly, DVRs enable people to watch more television. The more people who access cultural products, the more progress there is in society. That is why Lohmann said that technologies created by limitations and exceptions are creating new opportunities for innovators, consumers, and copyright owners.⁵¹¹

In summary, this section has justified that limitations and exceptions to copyright are an important part of promoting human development. They work for the public benefit by giving the public access to knowledge for education, self-entertainment, and play. They also contribute to facilitating cultural diversity and preserving cultural heritage knowledge, as well as protecting the freedom of expression of a democracy society. This thesis argues that it is possible to foster human development in Vietnam using properly constructed limitations and exceptions to copyright.

4.4 CONCLUDING REMARKS

This chapter has answered the research question on the role of copyright limitations and exceptions in facilitating innovation and development. In particular, copyright limitations and exceptions facilitate innovation and economic development by creating open zones for the public to access cultural expression, providing ‘start-up capital’ for innovators, encouraging the entrepreneur to invest in risky

⁵¹⁰ Joe Flint, ‘Higher DVR usage becomes a mixed blessing for TV industry’ *Los Angeles Times* (Los Angeles), 29 October 2012 <<http://articles.latimes.com/2012/oct/29/business/la-fi-ct-dvr-20121029>> (retrieved 15 April 2013).

⁵¹¹ von Lohmann, above note 398 at 7.

innovations, creating new markets for technology companies, and repairing market failures for the purpose of market efficiency. At the same time, limitations and exceptions serve to enhance human development by putting strong support in place to enhance a democratic society, opening gateways for the public to access knowledge for learning, research, and communication, and creating more opportunities for the public to enjoy cultural products, helping humans to preserve, enrich, and share cultural knowledge.

It was revealed throughout this chapter that the fair use doctrine is a flexible term that successfully provides ‘breathing room’ for potential innovators to create disruptive innovations. Therefore, a nation which desires to achieve economic growth by creating advantageous competition in the market via disruptive innovations should pay attention to adopting a flexible fair use defence in order to create more chances for innovators to try new things. This should be considered by Vietnam when making policies regarding innovation.

Furthermore, this chapter has shown that some limitations and exceptions have a tremendous impact on promoting innovation and development: namely, fair use or fair dealing (private use, quotation, parody or satire) for libraries or archives, for education, for disabled people, and reverse engineering of computer programs. Due to the limited length of a PhD thesis, this study only concentrates on the limitations and exceptions that are mentioned above, although the author acknowledges that all limitations and exceptions can improve innovation and development to some extent. Furthermore, some issues that can impact on the operation of limitations and exceptions in practice – namely, the use of licensing contracts overriding copyright limitations and exceptions and the use of TPMs to exclude or restrict the use of copyright limitations and exceptions – are not demonstrated in this study.

The next chapter discusses the international standard of copyright limitations and exceptions called the ‘three-step test’ – specifically, implied limitations and exceptions. Special limitations and exceptions will also be examined. It focuses on determining what the international requirements are, and to what extent national legislators can enjoy the freedom to tailor their domestic laws.

Chapter 5: The International Law on Copyright Limitations and Exceptions

By their nature, treaty provisions are usually expressed in more general and open-ended language than, say, provisions in national legislation, or conditions in a contract between parties. Nonetheless, there are generally accepted rules or canons of treaty construction that need to be applied.

Sam Ricketson⁵¹²

5.1 OVERVIEW

Previous chapters have explored why developing countries such as Vietnam need broad access to knowledge to develop growth and enhance human capabilities. Limitations and exceptions to copyright, an essential part of the copyright system, enable citizens to obtain access without prior authorisation. Being a developing country, Vietnam has special access needs; therefore, a broad scope of limitations and exceptions to copyright should be a good solution for this country.⁵¹³ However, limitations and exceptions to copyright are constrained by international conventions. The main restriction is the three-step test, as expressed in the *Berne Convention*.⁵¹⁴ This chapter examines the three-step test: the origin of the test in the *Berne Convention* and the adoption of the test in later conventions, the functions of the test, the meaning of the test, and how much room the test leaves for nations to tailor limitations and exceptions in their domestic laws. It intends to clarify the flexibility of the international requirements for limitations and exceptions and the freedom of

⁵¹² Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, Standing Committee on Copyright and Related Rights, Ninth Session, Geneva, June 23 to 27 2003 – SCCR/9/7 at 5 (5 April 5 2003) (hereinafter ‘WIPO Study’).

⁵¹³ It was identified in Section 3.2 and Section 3.3 of Chapter Three of this thesis that developing countries need access to acquire knowledge and technology from abroad for local use and the adaption of knowledge into local conditions. This helps developing nations to reduce poverty and promote their productivity and competitiveness. In addition, access to knowledge is a fundamental component for human progress, which is extremely necessary in developing countries.

⁵¹⁴ *Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886*, completed at Paris on 4 May 1896, revised at Berlin on 13 November 1908, completed at Berne on 20 March 1914, revised at Rome on 2 June 1928, at Brussels on 26 June 1948, at Stockholm on 14 July 1967, and at Paris on 24 July 1971, and amended on 28 September 1979, available at <http://www.wipo.int/treaties/en/ip/berne/summary_berne.html>;

nations in implementing such requirements. It aims to answer the question: to what extent is Vietnam able to expand its copyright limitations and exceptions?

Apart from the three-step test, *Berne* and beyond recognise a number of specific limitations and exceptions, such as for teaching purposes (art 10(2)), quotation (art 10(1)), news reporting (art 2(8)), the use of articles in newspapers or periodicals (art 10*bis*(1)), the use of works in the reporting of current events (art 10*bis*(2)), compulsory licences for rebroadcasting and cable retransmission (art 11*bis*(2)) and compulsory licences for mechanical recording of musical work (art 13(1)). The second section of the chapter examines some specific limitations and exceptions that relate to access; namely, limitations and exceptions for education, quotation, news reporting, and the use of work in current events. *Berne* sets out the minimum standard of limitations and exceptions by indicating that it is mandatory for all member states to provide limitations and exceptions for quotation in their domestic laws. Apart from that provision, *Berne* gives contracting countries the freedom to compose specific limitations and exceptions provisions in compliance with their local conditions by the norms of ‘fair practice’.

Access to copyright works by developing countries is also able to be obtained via limitations and exceptions specifically designed for developing countries under international copyright law. Compulsory licences for reproduction and translation that allow developing countries to access literary works in printed form are provided for in the Appendix of the *Berne Convention*. The second part of this chapter demonstrates the provisions of the *Berne* Appendix. It seeks to answer the question of whether special limitations and exceptions for developing countries can help to facilitate access to cultural expressions of developed countries for the purpose of innovation and development policy in the developing world. However, such schemes cannot help developing countries gain more access from industrial countries.

5.2 THE THREE-STEP TEST

The three-step test was first set out in the *Berne Convention 1971* and then adopted in the *TRIPS* and other copyright agreements; it is a general or abstract formula for determining limitations and exceptions for all signatories. This section looks briefly at the origin of the test and the adoption of the test through conventions such as the *TRIPS Agreement*, *WPPT*, *WCT* and some regional and bilateral

agreements. In doing so it illustrates that the three-step test has been the sole rule shaping limitations and exceptions in international copyright law. Furthermore, history may reveal the true intent of the test. As a matter of history, the test was set out to bridge variations among members of the *Berne Convention* on limitations and exceptions, so it must be subject to being interpreted generally or flexibly. This section then concentrates on the interpretation of the test. The three criteria of the test are analysed in depth. No official interpretation has been announced; therefore, the test is subject to different approaches: the interpretation of the *WTO Panel* in the *Section 110(5)* case, the policy-based approach, and the balanced approach. Despite divergent interpretations, the test is meant to be general or flexible. This section discusses the flexibility of the test, to explore how much room the test leaves for nations to craft their own national laws. The flexibility of the test allows nations to craft open-ended limitations and exceptions; it opens up the possibility of Vietnam providing limitations and exceptions to copyright.

5.2.1 The drafting history of the test in international conventions

The history of the test indicates that the aim was to bridge variations that existed among member nations; therefore, it must be general. The three-step test was initially established in the *Berne Convention* at the Stockholm revision conference in 1967, in order to set out a general rule in international law to bridge the differences in domestic laws. Administered by WIPO,⁵¹⁵ the *Berne Convention* (*Berne*)⁵¹⁶ is the fundamental copyright treaty and has been described as ‘the first and original international copyright convention’⁵¹⁷ and ‘the cornerstone of international copyright’.⁵¹⁸ Instead of detailing the exact level of protection that each country must

⁵¹⁵ The World IP Organisation (WIPO) is a specialised agency of the United Nations system of organisations, with its headquarters in Geneva, Switzerland. It administers 23 international treaties with respect to IP protection. See more at WIPO, ‘What is WIPO?’ <<http://www.wipo.int/about-wipo/en/>> (retrieved on 14 May 2013). ;

⁵¹⁶ The *Berne Convention* was first signed at Berne, Switzerland, 1886 and has since been revised six times, at Berlin in 1908, completed at Berne in 1914 and then revised at Rome in 1928, at Brussels in 1948, at Stockholm in 1967, and at Paris in 1971 and was amended in 1979. When the treaty was first signed there were only eight countries as signatories. Currently, this number has been increased to 186 countries. See more at WIPO, *Summary of the Berne Convention for the Protection of Literary and Artistic Works* (1886) <http://www.wipo.int/treaties/en/ip/berne/summary_berne.html>; WIPO, ‘Facts and Figures’ <<http://www.wipo.int/about-wipo/en/>> (retrieved on 14 May 2013).

⁵¹⁷ Stephen M Stewart, *International Copyright and Neighbouring Rights* (Butterworths, 1989) 146.

⁵¹⁸ Matt Jackson, ‘Harmony or Discord? The Pressure Toward Conformity in International Copyright’ (2003) 43 (4) *IDEA: The Journal of Law and Technology* 607, 620.

enforce, *Berne* only provides the minimum international standards of protection.⁵¹⁹ At the 1967 Stockholm Revision Convention, the three-step test was set out as a counterweight to the formal recognition of a general right of reproduction.⁵²⁰ Prior to the Stockholm Revision Conference there was no general rule requiring members to implement limitations and exceptions in their domestic laws. At the same time, various specific limitations and exceptions provisions were introduced in the national laws of member states: civil law countries such as France, Germany, and the Netherlands had a list of specific exceptions, while common law countries such as the UK and Canada used open-ended limitations and exceptions of fair use and fair dealing.⁵²¹ Other countries such as India and Romania proposed compulsory licences for reproduction.⁵²² The Stockholm Revision Conference aimed to bridge the variations among members on this issue. Furthermore, the flexibility in the exercise of the reproduction right decided at the Stockholm Revision Conference required that countries ‘would not be permitted to maintain or introduce exceptions so wide as to undermine the reproduction right’.⁵²³ Accordingly, art 9(2) of *Berne* (approved by the *Paris Act* 1971) introduced setting out the general rule, with three requirements that must be satisfied for an exception or limitation of the reproduction to fall within the range of circumstances envisaged by the rule. Today this rule is known as the three-step test:⁵²⁴

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.⁵²⁵

⁵¹⁹ Article 20 of the *Berne* allows for members to enter into special agreements among themselves in order to add more extensive rights to authors or contain more provisions, as long as they are not contrary to the Convention.

⁵²⁰ Prior to this Conference, the right of reproduction was not added into *Berne*, but stipulated in various provisions with different descriptions. See more at Christophe Geiger, Daniel Gervais and Martin Senftleben, ‘The three-step test revisited: How to use the test’s flexibility in national copyright law’ (2014) 29 (3) *AM. U. INT’L L. REV.* 581, 583 at footnote 1.

⁵²¹ Stewart, above note 517 at 148; Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works* (Kluwer, 1987) 484; Geiger, Gervais and Senftleben above note 520.

⁵²² Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works* (Kluwer, 1987) 484.

⁵²³ Roger Knight, ‘Limitations and Exceptions Under the “three-step test” and in National Legislation – Differences Between Analog and Digital Environment’ (2001) World IP Organisation WIPO/CR/MOW/01/2 2 <www.wipo.int/edocs/mdocs/copyright/en/...cr.../wipo_cr_mow_01_2.doc>

⁵²⁴ The three-step test will be examined further below.

⁵²⁵ The *Berne Convention*, art 9(2).

The Agreement on Trade-Related Aspects of Intellectual Property Rights (*TRIPS Agreement*) concluded in 1994 forms part of the WTO package of trade agreements and is a major international instrument governing copyright universally.⁵²⁶ Article 9(1) of the *TRIPS* requires that WTO members comply with arts 1 to 21 of *Berne* regardless of whether the country in question is a *Berne* member or not.⁵²⁷ Article 13 of *TRIPS* adopted the test of *Berne* but slightly modified its language:

Members shall confine limitations and exceptions to exclusive rights to certain special cases, which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.⁵²⁸

Generally, WIPO stated, ‘there is no conflict between the *Berne* and *TRIPS Agreement* as far as exceptions and limitations to the exclusive rights are concerned’.⁵²⁹ However, in particular, *TRIPS* contains some important differences that impact on the applicability of limitations and exceptions. It extends the application of the three-step test beyond the reproduction right of *Berne* to all exclusive rights that are protected, including reproduction, adaptation, communication, and translation rights under *Berne*, as well as the rental right in *TRIPS*.⁵³⁰ Moreover, this interpretation of the test has been alleged to be narrower than *Berne*. Under *TRIPS*, members shall ‘confine’ limitations and exceptions, while under *Berne*, it is permissible for countries to allow limitations and exceptions. Thus, art 13 of *TRIPS* does not merely restate art 9(2) of *Berne*, it actually ‘narrows the scope of limitations and exceptions’.⁵³¹ Furthermore, *Berne* mentions ‘prejudice to interest of author’, whereas *TRIPS* talks about ‘prejudice to interest of the right

⁵²⁶ At present, 157 out of 196 countries in the world are members of this organisation. See more at *TRIPS Agreement 1994* <http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm>.

⁵²⁷ Article 9 (1) of *TRIPS*:

Members shall comply with Article 1 through 21 of the *Berne* (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom

TRIPS Agreement 1994 <http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm>.

⁵²⁸ Article 13 of the *TRIPS Agreement 1994* <http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm>.

⁵²⁹ WIPO, *Implications of the TRIPS Agreement on Treaties Administered by WIPO* (1996) 22-23.

⁵³⁰ See more at *The Report of WTO panel 15 June 2000* (WTO, WTO/DS/160/R) 30/

⁵³¹ Strba, above note 501 at 62-64; Okediji, above note 53 at 4-9.

holder'. In effect, the right-holder refers to not only the author, but also any person who has been assigned rights to a work.⁵³²

Likewise, the test has been incorporated into numerous other conventions: namely, art 10 of the *WIPO Copyright Treaty 1996* (WCT); art 16(2) of the *WIPO Performances and Phonograms Treaty 1996* (WPPT); art 13(2) of the *Beijing Treaty on Audio-visual Performance 2012*; and art 11 of the *Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled 2013* (Marrakesh Treaty). It is also repeated in art 5.5 of the *European Commission (EC) Directive 2001*⁵³³, and art 170 (5) of *NAFTA*.⁵³⁴ A number of Free Trade Agreements (FTAs) worldwide contain the three-step test, such as 16 FTAs between the US and other nations,⁵³⁵ and between the EU and many other countries.⁵³⁶

5.2.2 The interpretations of the test

The three-step test is abstractly expressed by *Berne*; thus, it is subject to numerous interpretations. The three conditions set forth in the test are: (1) certain special cases; (2) no conflict with a normal exploitation; and (3) no unreasonable

⁵³² Strba, above note 501 at 66; Alan Story, 'Don't ignore copyright, the "Sleeping Giant" on the TRIPS and International education agenda' in Peter Drahos and Ruth Mayne (eds), *Global Intellectual Property Right: Knowledge, Access and Development* (Palgrave Macmillan and Oxfam, 2002) 131; Max Planck, 'Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law' (June 2008) 3-4

<http://www.law.nyu.edu/sites/default/files/ECM_PRO_061920.pdf>.

⁵³³ The *Directive 2001/29/EC* of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (known as the Information Society Directive or the InfoSoc Directive) is a directive of the European Union enacted to implement the WIPO Copyright Treaty and to harmonise aspects of copyright law across Europe, such as copyright limitations and exceptions. *EC Copyright Directive 2001/29/EC* <http://europa.eu/legislation_summaries/information_society/data_protection/126053_en.htm>.

⁵³⁴ The most notable FTA is the North American Free Trade Agreement (NAFTA) between the US, Canada, and Mexico entered into force in 1 January 1994. It is said that NAFTA created the world's largest free trade area, which now links 450 million people, producing \$17 trillion worth of goods and services. USTR, North American Free Trade Agreement (NAFTA) <<http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta>> (retrieved on 3 June 2013).

⁵³⁵ For example: the same statement of three-step test is stated in art 4 (16) of the USE-Jordan FTA; in art 17.5 (3) of the US-Chile FTA; in art 16.4 (10) and 17.6 (3) of the US-Singapore FTA; in art 17.4 (100) (a) and 17.6 (3) (c) of the US-Australia FTA; in art 15.5 (11) (a) and 15.6 (3) c) of the US-Morocco FTA; in art 14.4 (10) (a) and 14.6 (3)(c) of the US-Bahrain FTA; in art 15.5 (10)(a) and 15.7 (3)(c) of the US-Dominican Republic Central America; in art 16.7 (8)(a) of the US-Peru FTA; in art 18.4 (10)(a) of the US-Korean FTA; and in art 4 (9) of the US-Vietnam FTA. See more at USTR, *Free Trade Agreements* <<http://www.ustr.gov/trade-agreements>> (retrieved on 3 June 2013).

⁵³⁶ European Commission, *International affairs: Free Trade Agreements* <<http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/>> (retrieved on 3 June 2013).

prejudice to the legitimate interests of the author/right-holders. Words used in the test are general and abstract. Moreover, the treaties themselves do not offer insight into the meanings of the test. Therefore, there are various approaches in the literature and by courts in interpreting the test. Significantly, the *WTO Panel* in the *Section 110(5)* case⁵³⁷ provides in-depth interpretation of the test based on rules stipulated by the *Vienna Convention*.⁵³⁸ In addition, there are some other different approaches that also interpret the test based on principles stipulated by the *Vienna Convention*, including the policy-based and balanced interpretations. This section investigates the meaning of the test from those various approaches.

5.2.2.1 The interpretation of the test by the WTO Panel in the Section 110 (5) case

The WTO panel introduced a report interpreting the three-step test in art 13 of *TRIPS* to resolve the dispute between European Communities and the US.⁵³⁹ The interpretation established by the WTO Panel is considered a supplementary means

⁵³⁷ On 15 June 2000, the WTO dispute-settlement panel provide a judgement against the US law by saying that s 110 (5) of the *US Copyright Act*, which exonerates certain commercial establishments such as bars, restaurants, and hotels that use non-dramatic musical works from copyright royalty payment when using ‘homestyle’ audio equipment, violated all three steps of the test in art 13 of *TRIPS*.

⁵³⁸ *Vienna Convention on the Law of Treaties (Vienna Convention)* governs rules of interpretation of customary public international law. General rules of interpretation of a treaty are set forth in arts 31–32 of the *Vienna Convention*:

Article 31:

- (1) A treaty shall be interpreted in *good faith* in accordance with the *ordinary meaning* to be given to the terms of the treaty in *their context* and in the light of *its object and purpose*.
- (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to treaty;
- (3) There shall be taken into account together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.
- (4) A special meaning shall be given to a term if it is established that the parties so intended.

Article 32:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

United Nations, *the 1969 Vienna Convention on the law of Treaties*

<http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>.

⁵³⁹ WTO, ‘United States-Section 110 (5) of U.S. Copyright Act – Report of the Panel’ WT/DS 160/R (2000) (hereafter ‘WTO Panel Report Section 110(5)’).

<[https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(%20wt/ds160/r*%20not%20rw*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUICChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%20wt/ds160/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUICChanged=true#)> (retrieved on 17 June 2013).

for interpretation of the three-step test of *TRIPS* pursuant to art 32 of the *Vienna Convention*.⁵⁴⁰ Moreover, Senftleben argued that the report is also qualified as ‘subsequent practice’ in the sense of art 31(3)(b) of the *Vienna Convention*, as it features the actual interpretation of *TRIPS* provisions ratified by the members of the WTO.⁵⁴¹ Therefore, this thesis refers to the WTO Panel Report to clarify the test.

Overall, the WTO Panel noted that the three-step tests are cumulative – that is, all of them apply jointly to limitations and exceptions; therefore, if a limitation or exception fails to comply with any one of the steps, it does not meet the test and is disallowed.⁵⁴² The test as understood by the Panel is detailed below.

1. Certain Special Cases

The first prerequisite is that limitations and exceptions are only allowed in ‘certain special cases’. ‘The ordinary meaning of the terms in their context and in light of its object and purpose’⁵⁴³ should be referred to initially. According to the Oxford English Dictionary, the adjective ‘certain’ means ‘determined, fixed, exact, precise, definitive, settled, not variable or fluctuating’.⁵⁴⁴ The draft provision, which later became art 13 of *TRIPS* originally stated that limitations should be confined to ‘clearly and carefully defined special cases’. The WIPO Panel Report explains that ‘certain’ means:

‘...an exception or limitation in national legislation must be clearly defined. However, there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised. This guarantees a sufficient degree of certainty’.⁵⁴⁵

As to the meaning of ‘special’, its ordinary meaning refers to ‘having an individual or limited application or purpose, containing details, precise, specific’, ‘exceptional in quality or degree, unusual, out of ordinary’ or ‘distinctive in some way’.⁵⁴⁶ The WTO Panel observed that:

⁵⁴⁰ Ricketson, above note 552121 at 9.

⁵⁴¹ Senftleben, above note 449 at 107-110.

⁵⁴² WTO Panel Report Section 110(5), above note 539 at para 6.97.

⁵⁴³ Article 31(1) of the *Vienna Convention 1969*, above note 537.

⁵⁴⁴ ‘Certain, a.’, *The Oxford English Dictionary* (Oxford University Press, 2nd ed. 1989) OED Online <<http://dictionary.oed.com/>> (retrieved on 18 July 2013).

⁵⁴⁵ WTO Panel Report Section 110(5), above note 539 at para 6.108.

⁵⁴⁶ ‘Special, a.’, *The Oxford English Dictionary* (Oxford University Press, 2nd ed. 1989) OED Online <<http://dictionary.oed.com/>> (retrieved on 18 July 2013).

...more is needed than a clear definition in order to meet the standard of the first condition. In addition, an exception or limitation must be limited in its field of application or exceptional in its scope. In other words, an exception or limitation should be narrow in a quantitative, as well as a qualitative sense. This suggests a narrow scope, as well as an exceptional or distinctive objective. To put this aspect of the first condition into the context of the second condition ('no conflict with a normal exploitation'), an exception or limitation should be the opposite of a non-special, i.e., a normal case.⁵⁴⁷

The term 'case' can ordinarily refer to an 'occurrence', 'circumstance', 'event', or 'fact'.⁵⁴⁸

As a whole, 'certain special cases' suggests that there must be limits to any exception to the reproduction right that is made under art 9(2).⁵⁴⁹ The WTO Panel view was that 'a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach'.⁵⁵⁰ Accordingly, the WTO Panel indicated that in order to determine whether the first condition is satisfied, 'We firstly examine whether the exceptions have been clearly defined. Second, we ascertain whether the exemptions are narrow in scope, inter alia, with respect to their reach'.⁵⁵¹

2. Does not conflict with the normal exploitation of the work

In interpreting the second condition, the dictionary meaning is again helpful to define the words 'normal', and 'exploitation'. 'Exploit' can be defined as 'making use of' or 'utilising for one's own ends'.⁵⁵² 'Exploitation of the work' thus refers to 'the activity by which copyright owners employ the exclusive rights conferred on them to extract economic value from their rights to those works'. However, there are two possible meanings of 'normal'.⁵⁵³ Firstly, it means 'regular, usual, typical, and conventional'.⁵⁵⁴ Secondly, it refers to constituting or conforming to, not deviating or

⁵⁴⁷ WTO Panel Report Section 110(5), above note 539 at para 6.109.

⁵⁴⁸ 'Case, n.', *The Oxford English Dictionary* (Oxford University Press, 2nd ed. 1989) OED Online <<http://dictionary.oed.com/>> (retrieved on 18 July 2013).

⁵⁴⁹ Ricketson, above note 521.

⁵⁵⁰ WTO Panel Report Section 110(5), above note 539 at para 6.112.

⁵⁵¹ WTO Panel Report Section 110(5), above note 539 at para 6.113.

⁵⁵² 'Exploit, v.', *The Oxford English Dictionary* (Oxford University Press, 2nd ed. 1989) OED Online <<http://dictionary.oed.com/>> (retrieved on 18 July 2013).

⁵⁵³ WTO Panel Report Section 110(5), above note 539 at para 6.165.

⁵⁵⁴ 'Normal, a.', *The Oxford English Dictionary* (Oxford University Press, 2nd ed. 1989) OED Online <<http://dictionary.oed.com/>> (retrieved on 18 July 2013).

differing from, the common or standard'.⁵⁵⁵ This is considered the 'normative approach'. There is a need to address the question of which connotation of 'normal' is appropriate in the second step of the test.

The WTO Panels' view was that 'we do not feel compelled to pass a judgement on which one of these connotations could be more relevant. We will attempt to develop a harmonious interpretation which gives meaning and affect to both connotations of "normal"'.⁵⁵⁶

Initially, the WTO Panel suggested the empirical approach of Ricketson. Under the empirical approach of Ricketson, a limitation and exception should not fall within the range of activities from which the copyright owner reasonably expects to receive compensation.⁵⁵⁷ In particular, he indicated that:

The 'normal exploitation of a work' refers simply to the ways in which an author might reasonably be expected to exploit his work in the normal course of events. Accordingly, there will be kinds of use which do not form part of his normal mode of exploiting his work – that is, uses for which he would not ordinarily expect to receive a fee – even though they fall strictly within the scope of his reproduction right.⁵⁵⁸

This approach is critical, as authors are naturally not expected to exploit their work in areas which are placed beyond their control by a copyright limitation.⁵⁵⁹ Furthermore, the empirical approach developed by Ricketson might cause potential harm for both right owners and users. On the side of right owners, according to Senftleben, the empirical concept only emphasises actual markets; therefore, it is feared that this could lead to the gradual and uncontrolled abridgement of exclusive rights in cases where technical advances – digital technologies, for example – offer new possibilities for taking advantage of a limitation. On the side of users, it is feared that legislators could be hindered from imposing new limitations and exceptions that are appropriate in the digital environment.⁵⁶⁰ The WTO Panel therefore requires that

⁵⁵⁵ 'Normal, n.', *The Oxford English Dictionary* (Oxford University Press, 2nd ed. 1989) OED Online <<http://dictionary.oed.com/>> (retrieved on 18 July 2013).

⁵⁵⁶ WTO Panel Report Section 110(5), above note 539 at para 6.166.

⁵⁵⁷ Ricketson, above note 521 at 23.

⁵⁵⁸ Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works* (Kluwer, 1987) 483.

⁵⁵⁹ WTO Panel Report Section 110(5), above note 539 at para 6.188.

⁵⁶⁰ Senftleben, above note 448 at 175-176.

‘normal’ should be interpreted in normative approach; that is, a dynamic element capable of taking into account technological and market developments.⁵⁶¹

The normative concept was shown in the preparation work for the Stockholm Revision Conference of 1967, as follows:

However, it shall be a matter for legislation in the countries of the Union, having regard to the provisions of this Convention, to limit the recognition and the exercising of that right, for specified purposes and on the condition that these purposes should enter into economic competition with these works.

(...) All forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance, must be reserved to the authors.⁵⁶²

As such, in order to satisfy the second step, the utilisation of a work should not enter into economic competition with the normal ways of exploitation. This approach covers not only actual markets, but also potential ones that might emerge in the future.

The WTO Panel adopted the statement of the preparatory work for the Stockholm Revision Conference by citing it in the report. It also emphasised that:

We believe that an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work (i.e., the copyright rather than the whole bundle of exclusive rights conferred by the ownership of the copyright), if uses, that in principle are covered by that right but exempted the exception or limitation, enter into economic competition with the way that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains.

Thus, it appears that one way of measuring the normative connotation of normal exploitation is to consider, in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance.⁵⁶³

In short, it is reasonable to conclude that a conflict with a normal exploitation arises if the authors are deprived of an actual or potential market of considerable or practical importance. This means that limitations and exceptions should not fall within the range of activities from which the copyright owner reasonably expects to

⁵⁶¹ WTO Panel Report Section 110(5), above note 539 at para 6.

⁵⁶² Records the preparatory work for the 1967 Stockholm Conference, Doc. S/1, 112.

⁵⁶³ WTO Panel Report Section 110(5), above note 539 at para 6.178-183.

receive compensation. Therefore, cases of compulsory license do not hurt the second step of the test, as the author receives compensation from uses.

3. Does not unreasonably prejudice the legitimate interests of the author (copyright holders)

To define this step, the words that appear need to be interpreted. According to the WTO Panel, ‘interests’ ordinarily means a legal right or title to a property, or to use or benefit of a property (including IP). It might also refer to a concern about a potential detriment or advantage, and more generally to something that is of some importance to a natural or legal person.⁵⁶⁴ The term ‘legitimate’ has two possible meanings: (1) comfortable to, sanctioned or authorised by, law or principle, lawful, justifiable, proper; and (2) normal, regular, conformable to a recognised standard type.⁵⁶⁵ In the context of the test, the Panel indicated that ‘legitimate interests’ are ‘interests that are justifiable in light of the objectives that underlie the protection of exclusive rights’.⁵⁶⁶

The ordinary meaning of ‘prejudice’ is damage, harm, or injury.⁵⁶⁷ ‘Not unreasonable’ may be equal to ‘reasonable’ in ordinary meaning, but the WTO Panel Report said the former was more strict than the latter. ‘Reasonable’ connotes ‘proportionate’, ‘within the limits of reason, not greatly less or more than might be thought likely or appropriate’, or ‘of a fair, average, or considerable amount or size’.⁵⁶⁸

It is observed that all copying is damaging to some degree; the key point is ‘which degree or level of “prejudice” may be considered as “unreasonable”’. In the view of the WTO Panel, a prejudice ‘reaches an unreasonable level if an exception or limitation causes, or has the potential to cause, unreasonable loss of income to the copyright owner’.⁵⁶⁹

It is important to note that the 1967 Stockholm Revision Conference established a principle that the payment of equitable remuneration could be taken

⁵⁶⁴ WTO Panel Report Section 110(5), above note 539 at para 6.223.

⁵⁶⁵ WTO Panel Report Section 110(5), above note 539 at para 6.224.

⁵⁶⁶ WTO Panel Report Section 110(5), above note 539 at para 6.224.

⁵⁶⁷ ‘Prejudice, n’, Oxford English Dictionary.

⁵⁶⁸ ‘Reasonable, a.’ Oxford English Dictionary, cited by the WTO Panel Report 6.225.

⁵⁶⁹ WTO Panel Report Section 110(5), above note 539 at para 6.229.

into account in the context of the third step.⁵⁷⁰ Thus, the third step allows payment of equitable remuneration under statutory licences to overcome an otherwise unreasonable injury to the author's legitimate interests.⁵⁷¹ In particular, the Report of Main Committee I of the 1967 Stockholm Revision Conference states:

If it [the photocopying] consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, providing that, according to national legislation, an equitable remuneration is paid. If a small number of copies are made, photocopying may be permitted without payment, particularly for individual or scientific use.⁵⁷²

Similarly, by citing the Guide to the *Berne Convention*, the WTO Panel agreed that the prejudice might be brought back to tolerable levels if reasonable compensation is provided.⁵⁷³

In summary, the WTO Panel provides a restrictive interpretation of the test. It requires that the 'special certain case' must be clearly defined or foreseeable, and should be narrow in its scope and reach. The second step is satisfied if the utilisation of a work does not enter into economic competition with the normal ways of exploitation. However, the Panel states that legitimate interests involve more than economic considerations,⁵⁷⁴ and that the third step slanted too much towards the economic loss of the right-holder.

5.2.2.2 Alternative approaches in interpreting the test

The economic interpretation by the WTO Panel has been criticised for not sufficiently taking into account non-economic considerations such as social or cultural value when evaluating the test.⁵⁷⁵ Additionally, the WTO Panels' interpretation concentrates excessively on wording interpretation and is too rigid on

⁵⁷⁰ Senftleben, above note 449 at 237.

⁵⁷¹ Ricketson, above note 558 at 483-486.

⁵⁷² Reports of the Five Main Committees of the IP Conference of Stockholm 7, 26-27 (1967).

⁵⁷³ WTO Panel Report Section 110(5), above note 539, quoted from the Guide to the Berne Convention (para 9.8 pp 55-56) that 'in cases where there would be serious loss of profit for the copyright owner, the law should provide him with some compensation (a system of compulsory licensing with equitable remuneration).

⁵⁷⁴ WTO Panel Report Section 110(5), above note 539 at para 6.227.

⁵⁷⁵ Geiger, Gervais and Senftleben, above note 520 at 597; Ricketson, above note 558 at 771-772; Senftleben, above note 449 at 137.

the sequentiality of the test.⁵⁷⁶ Two possible alternative interpretations in literature, as well as applied by national courts, are as follows.

A normative/policy-based interpretation of the test

It was suggested by Christopher Geiger that in the context of the *TRIPS Agreement*, the three-step test should be normatively understood based on the objectives and principles laid down in the Preamble and arts 7 and 8 of the *TRIPS Agreement*.⁵⁷⁷ This approach is entirely compatible with art 31(1) of the *Vienna Convention*.⁵⁷⁸

Articles 7 and 8 of *TRIPS* provide express recognition that any IPR policy not only identifies the goals of technological innovation or economic development, but also acknowledges the wider public interest agenda. Article 7 lays down a principle of balance between rights and obligations, between economic goals and social welfare.⁵⁷⁹ Likewise, art 8 of *TRIPS* indicates that it is permissible for nations to formulate or amend their laws in order to meet ‘objectives and principles in sectors of vital importance to their socio-economic and technological development’.⁵⁸⁰ Similarly, the Preamble of *TRIPS* mentions the objective of promoting adequate protection mechanisms and the needs ‘in respect of maximum flexibility in the domestic implementation’.⁵⁸¹ Therefore, the interpretation of the test has to take relevant policy considerations into account, instead of confining the analysis to a strict wording and economic approach.⁵⁸²

⁵⁷⁶ Geiger, Gervais and Senftleben, above note 520; Christopher Geiger, ‘Exploring the Flexibility of the TRIPS Agreement’s Provisions on limitations and exceptions, In Annette Kur and Vytautas Mizaras (eds), *The Structure of IP Law: Can one size fit all?* (Edward Elgar, 2001) 287.

⁵⁷⁷ Geiger, Gervais and Senftleben, above note 520; Christopher Geiger, ‘The Role of The Three-Step Test in the Adaptation of Copyright Law to the Information Society’ UNESCO e-Copyright Bulletin (January-March 2007) <http://portal.unesco.org/culture/en/ev.php-URL_ID=34481&URL_DO=DO_TOPIC&URL_SECTION=201.html> 6 (retrieved 26th July 2013; note 85).

⁵⁷⁸ The three-step test was formed by *Berne* but broadened by the *TRIPS* and *WIPO* treaties, therefore the provisions of *TRIPS* and *WCT* should be considered as a relatively strong source of interpretation, according to art 31(1) of the *Vienna Convention* mentioned above note 539.

⁵⁷⁹ Article 7 of *TRIPS*:

The protection and enforcement of IPRs should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

TRIPS Agreement <http://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm>

⁵⁸⁰ Article 8 of *TRIPS Agreement* <http://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm>.

⁵⁸¹ Preamble of *TRIPS Agreement* <http://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm>.

⁵⁸² Geiger, Gervais and Senftleben, above note 520 at 600.

The policy-based approach was adopted by the WTO Panel in dealing with the *Canada-Pharmaceuticals case* on the protection of pharmaceutical products in Canada.⁵⁸³ In this case, the Panel adhered to a normative, policy-based approach to interpret the three-step test of art 30 of *TRIPS* on patent rights.⁵⁸⁴ In this case, the test was interpreted more flexibly in the light of ensuring the equality and balance of IPR policy. For example, the term ‘normal’ in the second step was understood to mean ‘essential to the achievement of goals of patent policy’.⁵⁸⁵

The normative approach to the three-step test allows the interpretation of the test based on international obligations resulting from other treaties, because it can rely on art 31(3) of the *Vienna Convention* that ‘any relevant rules of international law applicable in the relations between parties’⁵⁸⁶ should be taken into account as understanding the test. For example, the *Universal Declaration of Human Rights* 1948⁵⁸⁷ and the *International Covenant of Economic, Social and Cultural Rights* 1966⁵⁸⁸ are guidelines for the interpretation of *TRIPS* as a whole and the three-step test specifically. Accordingly, the second step of the test has to be interpreted in light of the above treaties, which are in favour of an open scope of limitations and exceptions to copyright.

A balanced interpretation of the test – Max Planck Declaration

Through the Max Planck Project conducted by the Max Planck Institute for Intellectual Property and the School of Law at Queen Mary College, University of London, a group of IP experts proposed a ‘declaration on a balanced interpretation of

⁵⁸³ Report of the WTO Panel, *Canada – Patent Protection of Pharmaceutical Products: Complaint by EU and their member states* para. 26 WTO/DS114/R (17 March 2000)

⁵⁸⁴ Ibid.

⁵⁸⁵ Report of the WTO Panel of Canada – Patent Protection, above note 583 at para.7.58.

⁵⁸⁶ See *Vienna Convention* Section 4.1.2 of Chapter Four.

⁵⁸⁷ Article 27 of the *Universal Declaration of Human Rights*.

⁵⁸⁸ Article 15, *International Covenant on Economic, Social and Cultural Rights*:

The States Parties to the present Covenant recognise the right of everyone:

- (a) To take part in cultural life;
- (b) To enjoy the benefits of scientific progress and its applications;
- (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

International Covenant on Economic, Social and Cultural Rights 16 December 1966) 993 U.N.T.S.

the three-step test'⁵⁸⁹ that aimed to secure a balanced interpretation of the test in copyright law.

The declaration considers that copyright law ultimately benefits public interests. Public interest is 'not well served if copyright law neglects the more general interest of individuals and groups in society when establishing incentives for right holders'.⁵⁹⁰ The balance of copyright law is also emphasised in arts 7, 8 and the Preamble of *TRIPS* and the *WCT* and *WPPT*. Limitations and exceptions are the most important legal instrument balances between the conflicting interests of the right holder and general public. Thus, the three-step test, which determines the scope of limitations and exceptions, needs to consider interests equally rather than merely caring the interests of copyright holders. The *Max Planck Declaration* did not agree with the WTO Panel in the *Section 110 (5) case* in interpreting the test to overly focus on economic interests of copyright holders.⁵⁹¹

The balanced approach requires that the interpretation be a comprehensive overall assessment, rather than a step-by-step application. No single step should be given priority over the others. Moreover, the test 'does not require limitations and exceptions to be interpreted narrowly. They are to be interpreted according to their objectives and purposes'.⁵⁹² The interpretation of the first step of the test does not prevent nations from introducing 'open-ended limitations and exceptions, as long as the scope of such limitations and exceptions is reasonably foreseeable',⁵⁹³ nor 'prevent courts to create further limitations and exceptions to copyright'.⁵⁹⁴ Finally, interests deriving from human rights and fundamental freedom, interests in competition, and other public interests must be taken into account when interpreting the third step of the test.⁵⁹⁵

The *Max Planck Declaration* has been subject to some critiques. It is alleged it is weighted too much towards public interest and too little on the side of right-

⁵⁸⁹ Max Planck Institute for Intellectual Property, Competition and Tax Law, *Declaration – A balanced interpretation of the “three-step test” in copyright law* available at <http://www.ip.mpg.de/files/pdf2/declaration_three_step_test_final_english1.pdf> (retrieved 20 January 2015).

⁵⁹⁰ Ibid.

⁵⁹¹ Ibid, art 1.

⁵⁹² Ibid, art 2.

⁵⁹³ Ibid, art 3.

⁵⁹⁴ Ibid.

⁵⁹⁵ Ibid, art 6.a.

holders.⁵⁹⁶ In addition, it is contrary to the wording and history of the three-step test in requiring the sequential test.⁵⁹⁷ However, it seems to be acceptable in the current era, where current international copyright law favours the protection of copyright holders.

5.2.3 The flexibility of the test

There have been some critiques of three-step test by academics, in that it is uncertain⁵⁹⁸ and too rigid to adapt to the dramatically changing world.⁵⁹⁹ For the purpose of this thesis, the shortcomings of the test in the literature are not examined. This section attempts to clarify the possible flexibility of the test that developing nations can lean on to provide a broad scope of limitations and exceptions, even to open-ended like fair use's US style.

5.2.3.1 The test is flexible

First, for the most part, the test is flexible because it uses abstract words, as well as having no official interpretation. As demonstrated above, the open-ended wording of the test obviously supports a flexible approach in interpretation. The requirements of 'certain special cases', 'normal exploitation', and 'unreasonable prejudice' are vague or 'far from being clear',⁶⁰⁰ or 'more open-ended'.⁶⁰¹

The test establishes a set of abstract criteria and offers room for different interpretations.⁶⁰² Moreover, such interpretations are not official and are not mandatory for nations to obey. Three different interpretations mentioned above are suitable to the *Vienna Convention*, so they are all important. The interpretation of the WTO Panel in the *Section 110(5) case* is the most important indication for countries,

⁵⁹⁶ Geiger, Gervais and Senfleben, above note 520 at 609; Reto M Hilty, 'Declaration on the "Three-Step Test": Where do we go from here?' (2010) 1 *JIPITEC* 83.

⁵⁹⁷ The Max Planck Declaration, above note 589.

⁵⁹⁸ David J Brennan, 'The Three-Step Test Frenzy – why the *TRIPS* Panel Decision might be considered per Incuriam' (2002) 2 *IP Quarter* 212, 225 (saying the first step is unclear and can raise a question regarding the compatibility of fair use or fair dealing with this step); Ricketson, above note 521 at 26.

⁵⁹⁹ Christopher Geiger, 'The Role of The Three-Step Test in the Adaptation of Copyright Law to the Information Society' UNESCO e-Copyright Bulletin (January-March 2007) <http://portal.unesco.org/culture/en/ev.php-URL_ID=34481&URL_DO=DO_TOPIC&URL_SECTION=201.html> 6 (arguing that the first step impeded the ability to extend the scope of limitations and exceptions in the digital environment).

⁶⁰⁰ Christophe Geiger, 'The role of the three-step test in the adaptation of copyright law to the information society' (2007) UNESCO Copyright Bulletin <http://portal.unesco.org/culture/en/ev.php-URL_ID=34481&URL_DO=DO_TOPIC&URL_SECTION=201.html> 6 (retrieved 26th July 2013).

⁶⁰¹ Ricketson, above note 521.

⁶⁰² Geiger, Gervais and Senfleben, above note 520 at 613.

but should not be seen as ‘the final word on the test’s interpretation’.⁶⁰³ This is witnessed by the fact that the WTO Panel in the *Section 110 (5) case* worked independently from the WTO Panel in the *Canada-Pharmaceuticals case*.⁶⁰⁴ Judgements were released separately, regardless of the fact that they resolved the same issue of interpretation of the three-step test of *TRIPS*. As discussed above, in interpreting the test, the decision of the WTO Panel in the *Section 110(5) case* was based on the wording and economic losses of copyright holders, while the Panel in the *Canada-Pharmaceuticals case* made their decision based on the balanced approach. Furthermore, it is unlikely that future judgments must bind into a precedent. Judges and administrators have to evaluate the precedent via practice. The precedent is accepted and repeated until it becomes stable and certain in the system. Therefore, the restrictive interpretation embraced by the WTO Panel *Section 110(5) case* is not relevant.

Even the interpretation of the WTO Panel *Section 110(5) case* contains factors of flexibility. The Panel stated that the first step requiring limitations and exceptions in national legislation must be clearly defined and should be narrow in its scope and reach.⁶⁰⁵ However, the Panel then adopted an open-ended approach by stating:

However, there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised. This guarantees a sufficient degree of legal certainty.⁶⁰⁶

This means the Panel left room for national members to create new limitations and exceptions or provide open-ended limitations and exceptions by allowing courts to make case-by-case determinations, as long as it ensures a sufficient degree of legal certainty.⁶⁰⁷ In addition, in step three of the test, although the Panel paid too much attention to the loss of income to the copyright holder, the Panel acknowledged that legitimate interests involved more than economic considerations.⁶⁰⁸ It thus opens up a flexible evaluation of the third test for nations that ‘legitimate interests’ may cover all interests, both economic and non-economic, such as social and cultural factors.

⁶⁰³ Geiger, Gervais and Senftleben, above note 520 at 626.

⁶⁰⁴ WTO, Report of the WTO Panel, *Canada – Patent Protection of Pharmaceutical Products: Complaint by EU and their member states* WTO/DS114/R, above note 583.

⁶⁰⁵ WTO Panel Report Section 110(5), above note 539 at para 6.108.

⁶⁰⁶ WTO Panel Report Section 110(5), above note 539 at para 6.108.

⁶⁰⁷ Geiger, Gervais and Senftleben, above note 520 at 613.

⁶⁰⁸ WTO Panel Report Section 110(5), above note 539 at para 6.227.

Additionally, the flexible interpretation approach of the test was acknowledged from the establishment date of the test. It was revealed from the drafting history of the test that at the 1967 Stockholm Revision Conference, provisions of limitations and exceptions to copyright occurred in national laws. Civil law countries adhered to a specific list, while common law countries provided open-ended fair use or fair dealing. The establishment of the three-step test was considered a compromise to bridge all differences.⁶⁰⁹ Hence, a flexible approach of interpretation would be preferred. Moreover, as noted above,⁶¹⁰ the official text of the test was taken from the UK submission. At that time, the UK itself had flexible fair dealing in its law; therefore, the adoption of an abstract formula rather than a closed list of limitations and exceptions must be considered. That is to say, the drafting history of the test itself supports the flexibility of the test.

Moreover, putting the test in the overall context of the *Berne Convention* and *TRIPS*, it can be seen that the conventions do not strictly require member nations to provide limitations and exceptions in their domestic copyright laws by saying that ‘it shall be a matter for legislation in the countries of the Union to permit...’.⁶¹¹ This means that international treaties grant states the discretion to determine the conditions under which certain copyrights can be exercised and to impose limitations and exceptions on the enjoyment of those rights. In other words, limitations and exceptions are permissive and not mandatory.⁶¹² Moreover, the *TRIPS* incorporates arts 1-21 of the *Berne*, but at the same time takes into account ‘public policy objectives of national systems for the protection of IP, including developmental and technological objectives’.⁶¹³ Therefore, it would be possible for a national legislature to allow for a more generous range of exceptions to exclusive rights on the basis that the *TRIPS* requires a more balanced approach to the interpretation of its provisions.⁶¹⁴

Furthermore, a recent interpretation of the test, as well as the recognition of the test by recent treaties, shows that a more flexible interpretation of the test is

⁶⁰⁹ Section 5.2.1 of this Chapter.

⁶¹⁰ Ibid.

⁶¹¹ Article 9(2) of the *Berne Convention*.

⁶¹² Robert Burrell and Allison Coleman, *Copyright exceptions: the digital impact* (Cambridge University Press, 2005) 2.

⁶¹³ The Preamble of the *TRIPS Agreement 1994*
<http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm>.

⁶¹⁴ Ricketson, above note 521 at 5.

desirable. The policy-based approach requires the interpretation in connection to objectives and principles of relevant conventions. This approach is entirely compatible with the *Vienna Convention* in interpreting international treaties. Firstly, it must be subject to the objectives and purposes pointed out by *Berne* and *TRIPS*. Balancing between conflicting rights and promoting public interest must be the priority.⁶¹⁵ Moreover, the conventions must respect the ‘maximum flexibility in the domestic implementation’.⁶¹⁶ Next, it has to obey the declaration of the *United Nations on Human Rights* and the *International Covenant of Economic, Social and Cultural Rights*, which all favour more broad limitations and exceptions to copyright. Adopted by the WTO Panel in the *Canada-Pharmaceutical case*, the policy-based interpretation approach seems to be more realistic for the future. Similarly, the balanced interpretation approach set out by the *Max Planck Declaration* has some value in pushing the interpretation toward more concern regarding public interest: it means a more flexible way of implementing the test. More importantly, the *WCT* makes the interpretation of the test toward flexibility more certain. The Preamble of the *WCT* emphasises the necessity ‘to maintain a balance between the rights of authors and the larger public interest, particularly education, research, and access to information, as reflected in the *Berne Convention*’.⁶¹⁷ The understanding of the test as a flexible framework for the adoption of limitations and exceptions at a national level is clearly expressed in the Agreed Statement concerning art 10 of the *WCT*, as follows:

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the *Berne Convention*. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the *Berne Convention*.⁶¹⁸

A statement like the above that allows national laws to create new limitations and exceptions based on the three-step test is ‘a guideline for the future of extension

⁶¹⁵ Article 7, 8 of *TRIPS*, discussed above at Section 4.1.3.

⁶¹⁶ Preamble of *TRIPS*, discussed above at Section 4.1.3.

⁶¹⁷ Agreed Statements concerning the *WCT* (adopted by the Diplomatic Conference on December 1996) available at <<http://www.wio.int/treaties/en/ip/wct/statements.html>>.

⁶¹⁸ The *WCT 1996*.

of existing limitations and exceptions in the digital age'.⁶¹⁹ This movement makes the flexible interpretations of the three-step test more visible.

All of the above arguments have shown that the abstract criteria of the three-step test can be interpreted flexibly. This raises the important question of how much room there is for nations to design limitations and exceptions to copyright into their domestic laws.

5.2.3.2. The level of flexibility

Questions have arisen regarding the maximum freedom nations can enjoy from constraint created by the three-step test. The answer cannot be defined, but it is possible to say that the flexible interpretation of the test undoubtedly supports a huge freedom for nations to expand the scope of limitations and exceptions, even adopting open-ended limitations and exceptions like the fair use style of US.⁶²⁰ The WCT, as mentioned above, allows new limitations and exceptions into domestic laws. Furthermore, a balanced interpretation of the test requires extending the scope of copyright limitations and exceptions consistent with the increasing protection of copyright holders. The drafting history of the test did not reject the open-ended limitations and exceptions of fair use, as is evident in that the US has not been asked to amend their open ended limitations and exceptions of fair use while being a member of such organisations. In contrast, many other countries have adopted or are going to adopt fair use defences. Therefore, it is possible for nations to introduce open-ended limitations and exceptions like the fair use style of the US.

However, some scholars doubt the compatibility of open-ended fair use with the three-step test of the *Berne Convention*, as well as the *TRIPS Agreement*.⁶²¹ Firstly, the fair use doctrine is too broad to qualify as a certain special case. Pursuant to the interpretation given by the WTO Panel, art 13 of *TRIPS* requires that

⁶¹⁹ Geiger, Gervais and Senftleben, above note 520 at 591.

⁶²⁰ Fair use doctrine of the US is examined in Chapter Six of this thesis.

⁶²¹ For example, Professor Okediji said 'the indeterminacy of the fair use doctrine violates the Berne Convention'. See more at Ruth Okediji, 'Toward an international Fair Use Doctrine' (2000-2001) 39 *Columbia Journal Transnat'l L* 75, 117. In addition, Professor Sam Ricketson argued that:

...the real problem is with a provision that is framed in such a general and open-ended way. At the very best, the statutory formulation here raises issues with respect to unspecified purpose (the first step) and with respect to the legitimate interests of the author (third step).

Ricketson, above note 521 at 69. Likewise, Herman Cohen Jehoram stated that 'the open American "fair use" system in fact violates the Berne Convention with its specific restrictions which serve to guarantee the rights of authors'. Herman Cohen Jehoram, 'Restrictions on Copyright and Their Abuse' (2005) 27 *European IP Review* 359, 360.

exceptions in national legislation should be ‘clearly defined and narrow in scope’.⁶²² The fair use provision is deemed to conflict with this requirement, as it is a case-by-case determination, and it is possible to apply to all types of work and to any purposes of the use, which makes it capable of endless expansion by the courts. Sam Ricketson pointed out that fairness is ‘an insufficiently clear criterion’ to meet the ‘certain special cases’.⁶²³ He argued that the fair use doctrine is framed in such a way that the purpose and fairness of the use are only established on a case-by-case basis; thus, it cannot be predicted in advance.⁶²⁴ Secondly, the fair use judicial practice was criticised during the *TRIPS* Council review of the US legislation in 1996 as violating the third step of the three-step test when the US court upheld fair use for parody.⁶²⁵ In cases of parody, for example, the courts tend to find fair use even when it causes adverse effect to the normal exploitation of the work, as well as to the market of the author.⁶²⁶ This is explainable in that fair use has existed for far longer than the three-step test. It is a judicial concept that appeared in 1841 and was then consolidated into the *Copyright Act 1976*,⁶²⁷ while the three-step test first appeared in international copyright in 1967.⁶²⁸

Many other scholars have recently argued that the fair use provision meets the requirements of the three-step test.⁶²⁹ The three-step test ‘itself is an open-ended norm...like the US fair use...it establishes a set of abstract criteria’.⁶³⁰ Martin Senftleben indicated that the language of the test does not require a completely precise determination of the scope of the application of limitations and exceptions.⁶³¹ In response to the doubt regarding the violation of the first step, Senftleben said the interpretation of the first step of the test does not require domestic law to precisely determine the scope of limitations and exceptions, as long as it is reasonably

⁶²² WTO Panel Report Section 110(5), above note 539.

⁶²³ Ricketson, above note 521 at 68.

⁶²⁴ Ricketson, above note 521.

⁶²⁵ Council for TRIPS, ‘Review of Legislation on Copyright and Related Rights’, WTO Doc. IP/Q/USEA/1 (30 October 1996).

⁶²⁶ In the *Campbell* case, for example.

⁶²⁷ The *Copyright Act 1976* of the US is available at <<http://copyright.gov/title17/>>.

⁶²⁸ Chapter 3 of this thesis; J Olive, ‘Copyright in the WTO: The Panel Decision on the Three-Step Test’ (2002) 25 *Columbia Journal of Law and the Arts* 119, 119.

⁶²⁹ Strba, above note 501 at 128-30; Mihaly J Ficsor, ‘Short Paper on the Three-Step Test for the Application of Exceptions and Limitations in the Field of Copyright’ prepared for the Central and Eastern European Copyright Alliance (CEECA) (30 November 2012) 5 <http://www.copyrightseesaw.net/archive/?sw_10_item=28>; Geller, (1995) 29 *IP Law* 99, 112; AU Copyright Law Review Committee, ‘Simplification of the Copyright Act 1968’ para. 6.14.

⁶³⁰ Geiger, Gervais and Senftleben, above note 520 at 612-13.

⁶³¹ Senftleben, above note 449 at 163.

foreseeable.⁶³² Similarly, the WTO Panel on the *Section 110(5) case*, as said above, emphasised that ‘there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised. This guarantees a sufficient degree of legal certainty’.⁶³³ Apparently, the fair use doctrine provides a sufficient level of legal certainty.⁶³⁴ It does not allow any use of the work without permission, but is subject to fairness requirements. Therefore, the open-ended fair use doctrine complies with the first step of the test. Moreover, there are parallels between the criteria of the three-step test and the four factors of fair use. In particular, the second step of the test – ‘the prohibition of a conflict with a normal exploitation’ – is similar to the fourth factor of the fair use doctrine.⁶³⁵ In her book, Strba protested Ricketson’s argument. She argued that under international treaties, there is no need to explicitly repeat what international treaties describe. In fact, the US fair use is compatible with the three-step test through judicial practice.⁶³⁶ Particularly, she observed that the fourth factor of fair use is emphasised on ‘market effect’ that differs from the third step (‘prejudice the legitimate interests of the author’). However, in judicial practice, the courts interpret this factor at the same level as the third step of the *Berne Convention*. For example, in the *Sony case*, the reason for the finding of fair use of ‘time-shifting’ was ‘no likelihood of harm was shown on trial, and the plaintiff admitted that there had been no actual harm to date’.⁶³⁷ Likewise, in the *Princeton University Press v. Michigan Document Service*⁶³⁸ case, the Court held fair use was allowed because the authors did not have an interest in the market. Similarly, in the case of *Campbell*,⁶³⁹ evidence of substantial harm was weighed against a finding of fair use. Strba concluded that the fair use doctrine ‘mirrors the three-step test’.⁶⁴⁰

⁶³² Senftleben said that in the interpretation of the first step ‘the task of making different privileged uses discernible, need not necessarily be accomplished by statutory provisions, but rather they can be left to the courts, leaving room to the use case law in the quest for certainty on limitations and exceptions’. Senftleben, above note 449 at 163.

⁶³³ WTO Panel Report Section 110(5), above note 539 at para 6.108

⁶³⁴ Eduardo Lycurgo Leite, ‘Fair use doctrine as a limitation to copyright and a comparative analysis of the three-step test in the copyright system of Brazil and the US’ (PhD thesis, 2014) 346.

⁶³⁵ Geiger, Gervais and Senftleben, above note 520 at 606 and 613. The authors draw parallels between s 107 (4) and the second step of the test.

⁶³⁶ Strba, above note 501 at 128-30.

⁶³⁷ *Sony Corp. v. Universal Studios* 464 U.S. 417 (1984) , para. IV B.

⁶³⁸ 99 F. 3d 1381 (1994).

⁶³⁹ 510 U.S. 569 (1994) para. II D.

⁶⁴⁰ Strba, above note 501 at 130.

Responding to the case of parody, Strba argued that parody is still compatible with the three-step test because the market served by a work of parody is not the kind that a right-holder in the original work would normally exploit within the meaning of the three-step test.⁶⁴¹ Considering the third step of the test, the US fair use is not in conflict to this step at all, because if the parody affects the market by merely suppressing the demand, then there is no substantial harm to the market, so it is found to be fair use.⁶⁴² However, if the parody occupies the market of the original work, then the market impact is substantial and a finding of fair use will be rejected.⁶⁴³ That is to say, the three-step test does not prevent the introduction of open-ended limitations and exceptions into domestic laws, as long as the scope of limitations and exceptions can be reasonably predicted. Therefore, the fair use doctrine in US law, which fulfils the condition of legal certainty, is likely to comply with the three-step test of the *Berne Convention* and beyond.

In the reality, the flexibility of the test up to the level of fair use has become more accurate as a number of nations (both developing and developed countries) have recently adopted open-ended fair use copyright limitations and exceptions. The 1997 *IP Act* of the Philippines, the 2007 *Copyright Act* of Israel, the 2013 *Copyright Act* of South Korea, and the 2006 amendment of the *Singapore Copyright Act* introduced fair use into legislation.⁶⁴⁴ Canada has recently expanded the scope of fair dealing to allow for more flexibility.⁶⁴⁵ Reviews in Australia and the UK have proposed open-ended limitations and exceptions in their copyright laws.⁶⁴⁶ This creates the possibility for Vietnam to permit flexible or open-ended limitations and exceptions like the US fair use style to promote innovation and development.

In addition, it is worth noting that the goal of the three-step test is to set limits for potential national limitations and exceptions; thus, it enables nations to freely decide their specific limitations and exceptions. Since it was established at the 1967

⁶⁴¹ Strba, above note 501 at 131.

⁶⁴² *Campbell v. Acuff-Rose Music* 510 U.S. 569 (1994) at 589.

⁶⁴³ *Basic Books, Inc v. Kinko's Graphics Corporations* 758 F. Supp. 1522 (1991) para. II D.

⁶⁴⁴ Geiger, Gervais and Senftleben, above note 520 at 624.

⁶⁴⁵ In the recent copyright enactment, Bill C-20 and the decisions of the Supreme Court. See more at Michael Geist, Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use, in *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundation of Canadian Copyright Law* (University of Ottawa Press, 2013) cited by Geiger, Gervais and Senftleben, above note 520 at footnote 159.

⁶⁴⁶ ALRC, Copyright and Digital Economy 59-98 (Discussion paper No.79, 2013); Ian Hargreaves, *Digital Opportunity: A Review of IP and Growth* (UK IP Office, 2011) 44-52.

Stockholm Revision Conference, the international three-step test has not directly decided which specific limitations and exceptions are permissible. It has drawn a baseline that nations can use. Based on that baseline, nations create their own limitations and exceptions. Thus, the test creates ‘breathing space’⁶⁴⁷ for the adoption of new limitations and exceptions at the national level. For example, limitations and exceptions for reproduction of the work for private use introduced by many national laws are not expressly mentioned in the *Berne Convention* or other conventions. They were created at the national level based on the three-step test. It is quite easy to find many other examples of national limitations and exceptions leaning on the international three-step test of the *Berne Convention*, such as reproduction for research or education, privileges for libraries or archives, or limitations and exceptions for public or government use. That is to say, the three-step test does not restrict nations when introducing new limitations and exceptions – it just sets a limit to ensure the introduction of new limitations and exceptions at the national level do not unreasonably hurt the copyright holder. It creates space for the introduction of limitations and exceptions at the national level.

In conclusion, this section has found that the three-step test contained in the *Berne* is subject to flexible interpretation; as it has never been interpreted officially, it is a set of abstract criteria. Moreover, it must take into account the objective and principles of relevant conventions, such as the balance between rights and obligations, the purpose of promoting the public interest, and maximising the freedom of implementation of nations. In addition, it is a general rule to harmonise different global approaches on limitations and exceptions. Moreover, it does not determine which particular limitations and exceptions are allowed. It generally draws a limit that nations must rely on. Hence, national legislators could enjoy the freedom of implementing the test into national law in a flexible manner, to create their own limitations and exceptions – even open-ended limitations and exceptions – in order to satisfy domestic social, cultural, and economic needs, as long as they remain within the baseline of the test.⁶⁴⁸

⁶⁴⁷ Geiger, Gervais and Senftleben, above note 520 at 616.

⁶⁴⁸ Martin Senftleben, ‘The International Three-Step Test: A Model Provision for EC Fair use Legislation’ (2010) 1 *JIPITEC* 67, 75.

5.3 SUBSTANTIAL LIMITATIONS AND EXCEPTIONS REGULATED BY THE *BERNE*

The *Berne Convention* contains a number of provisions granting latitude to member states to provide other limitations and exceptions other than art 9(2). These provisions are typically circumstances such as uses of the work for educational or administrative purposes, or for reporting news where it is considered that the public interest should prevail against the private interests of authors. There are also situations where the interests of users of such material are given precedence; for example, in the case of domestic use. This section investigates some specific limitations and exceptions that support assess to explore to what extent the *Berne* leaves room for nations to draft their limitations and exceptions in these circumstances. This section argues that apart from the requirement of producing quotation in domestic laws, the *Berne Convention* does not create any obstacle for nations in drafting such limitations and exceptions; therefore, nations can expand their limitations and exceptions from quotation to open-ended fair use.

5.3.1 Quotation

It is mandatory for contracting countries under the *Berne Convention* to introduce quotation into their limitations and exceptions. ‘Quotation’ is ‘using parts of another person’s work in order to illustrate or prove a statement or to otherwise refer to such work’.⁶⁴⁹ Article 10(1) of *Berne* states that ‘it shall be permissible to make quotations from a work which has already been lawfully made available to the public...’.⁶⁵⁰ This means that each member must make this provision in its national legislation in relation to works claiming protection under the *Berne Convention* so that users can legally use quotations. This provision of *Berne* can be considered the minimum level at which a nation can start to construct limitations and exceptions.

By providing abstract requirements, *Berne* offers huge flexibility for nations in drafting quotation limitations and exceptions. It allows quotations to be taken from

⁶⁴⁹ Silke von Lewinski, *International Copyright Law and Policy* (Oxford University Press, 2008) 156.

⁶⁵⁰ Article 10(1) of *Berne*:

It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries

parts of a work or even an entire work.⁶⁵¹ Quotations can also be made from any kind of works, including literary, musical, artistic, or other work. However, the work must be lawfully made available to the public before making quotation. The *Berne Convention* uses the phrase ‘lawfully made available’ rather than ‘lawfully published’ to intentionally allow the author to decide which kind of rendering of the work to make available to the public.⁶⁵² If the author alone decided that his or her work, or parts of it, can become known to the public, quotation is permissible. For example, if a dramatic or musical work is published by making copies of the work available, it is not available for quotation. If that work is performed in public or broadcast, then quotation is permissible. In addition, the quotation must be compatible with ‘fair practice’. No further explanation was made for this term in later versions of *Berne*, which leaves the national laws to determine its meaning. Moreover, the extent of quotation must ‘not exceed that justified by the purpose’. The preparatory work for the Stockholm Revision Conference 1967 contended that quotations for ‘scientific, critical, informatory or educational purposes’ are within the scope of art 10(1).⁶⁵³ Quotations are also made for judicial, political, entertainment purposes, or for artistic effect.⁶⁵⁴ Article 10(1) refers to a specific kind of quotation – namely ‘quotations from newspaper articles and periodicals in the form of press summaries’. It is argued that such statements ‘make little sense’ as it was translated from French.⁶⁵⁵

However, it is suggested that the three-step test under art 9(2) should be satisfied before a quotation must be allowable in the context of ‘fair practice’.⁶⁵⁶ Nothing further was said about the length of the quotations to be allowed, but Ricketson stated it must be a matter which is relevant to the question of ‘fair practice’.⁶⁵⁷

⁶⁵¹ von Lewinski, above note 649 at 157; Ricketson and Jane G Ginsburg, *The Berne Convention for the Protection of Literary and Artistic Works* (Oxford University Press, 2006) Vol.1, 785.

⁶⁵² von Lewinski, above note 649 at 157.

⁶⁵³ The preparation work for the Stockholm Conference, Record 1967, 860 – 1.

⁶⁵⁴ The report of Committee of Experts 1965, Document S/1 117.

⁶⁵⁵ Sam Ricketson and Jane G Ginsburg, *The Berne Convention for the Protection of Literary and Artistic Works* (Oxford University Press, 2006) Vol.1, 787.

⁶⁵⁶ M Ficsor, *The law of Copyright and the Internet: The 1996 WIPO Treaties, their Interpretation and Implementation* (Oxford University Press, 2002) 5.14, Ricketson and Ginsburg, above note 655 at 785-86.

⁶⁵⁷ Ricketson and Ginsburg, above note 655 at 786.

5.3.2 Utilisation for teaching purposes

Under art 10(2),⁶⁵⁸ *Berne* mostly leaves the issue of use for teaching purposes as a matter for national legislation or bilateral agreement between member nations. It only stipulated some requirements within which national legislation must be carried out. First, any kind of works may be utilised for teaching by way of illustration in publications, broadcasts, sound, or visual recordings. In particular, publications for teaching include school books and course materials. Broadcasts for teaching are programs intended for teaching purposes. It was concluded at the Main Committee I of the 1967 Stockholm Revision Conference that the inclusion of works in a broadcast for schools and other education institutions was permitted, even where the broadcast is receivable by a much larger section of the general population.⁶⁵⁹ The limitation and exception does not only apply to the making of the broadcast itself, but to the public performance of that broadcast, such as in the school room or lecture theatre.⁶⁶⁰ Sound or visual recordings for teaching could be any educational recordings constructed especially for school or other teaching, including tapes, videograms, phonograph records, cinematographic films, as well as digital fixations of works. Second, the utilisation must be ‘by the way of illustration’ for the purpose of teaching. According to the Report of Main Committee I at the 1967 Stockholm Revision Conference, teaching included all levels – schools for children, universities, or other education institutions – regardless of their operators, but considered that ‘education outside these institutions, such as general teaching available to public but not included in the above categories, should be excluded’.⁶⁶¹ Furthermore, the word ‘teaching’ may cover not only face-to-face instruction or actual classroom instruction, but also distance teaching or online teaching.⁶⁶² Third, the utilisation of such works must be ‘compatible with fair practice’. It is suggested that the utilisation may be allowable for both parts of works and entire works, as long as such utilisation

⁶⁵⁸ Article 10 (2) of *Berne*

It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilisation, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilisation is compatible with fair practice.

⁶⁵⁹ Records of the 1967 Stockholm Conference at 887.

⁶⁶⁰ Ricketson and Ginsburg, above note 655 at 794.

⁶⁶¹ Records of the 1967 Stockholm Conference, 1148.

⁶⁶² Ricketson and Ginsburg, above note 655 at 793; Silke von Lewinski, *International Copyright Law and Policy* (Oxford University Press, 2008) 159.

is for the purpose of illustration of the subject matter taught and it must be fair.⁶⁶³ Like the limitation and exception for quotations under art 10(1), the three-step test in art 9(2) should be considered as the requirement of ‘fair practice’.⁶⁶⁴ It was noted by Sam Ricketson that there is no limitation on the number of copies that may be made in case of publications and sound or visual recordings, except the requirement that the making of multiple copies must be compatible with ‘fair practice’.⁶⁶⁵

5.3.3 Access to information and news reporting

The *Berne* contains limitations and exceptions in favour of access to information and news reporting for the benefit of the press. It is justified on the grounds of ‘the promotion of the free flow of information’.⁶⁶⁶ Noticeably, the *Berne* leaves horizontal freedom for nations in creating these limitations and exceptions.

1. Certain uses of lectures and addresses

Article 2bis(2) of the *Berne* allow lectures, addresses, and other works of the same nature during delivery in public to be reproduced by the press, broadcast, communicated to the public by wire or any other public communication devices for information purpose.⁶⁶⁷ Union countries are free ‘to determine the conditions’ under which such specific uses may be made; for instance, the payment of a fair remuneration, as long as the uses are for the purpose of informing the public about the contents.

2. The use of articles in newspapers or periodicals

Article 10bis(1)⁶⁶⁸ of the *Berne* allows member countries to freely ‘permit’ special use of works for newspapers or periodicals on current events that are

⁶⁶³ Ricketson and Ginsburg, above note 655 at 792; Silke von Lewinski, *International Copyright Law and Policy* (Oxford University Press, 2008) 158.

⁶⁶⁴ Ricketson and Ginsburg, above note 655 at 793.

⁶⁶⁵ Ricketson and Ginsburg, above note 655 at 795.

⁶⁶⁶ Ricketson and Ginsburg, above note 655 at 501.

⁶⁶⁷ Article 2bis(2) of the *Berne*:

It shall also be a matter for legislation in the countries of the Union to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire and made the subject of public communication as envisaged in Article 11^{bis}(1) of this Convention, when such use is justified by the informatory purpose.

⁶⁶⁸ Article 10bis(1) of the *Berne*:

It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not

restricted within economic, political, and religious topics, and for broadcast works of the same character. Such permissible uses are broadcasting, communication to the public by air, and reproduction by press.⁶⁶⁹ However, all permissible uses are subject to authorisation by the author if he or she expressly reserves his rights. Moreover, the source must be clearly indicated, otherwise the use is illegal.

3. Use of works in reporting of current events

To facilitate the flow of information, art 10bis(2)⁶⁷⁰ of the *Berne* allows copyright works seen or heard in the course of the event to be reproduced or made available to public. These limitations and exceptions are subject to only one condition: it must be for information purposes. Member nations can enjoy unlimited freedom to determine additional conditions for these limitations and exceptions.

In summary, the *Berne Convention* contains some specific limitations and exceptions that support public access. Among these limitations and exceptions, only quotation is actually mandatory; the others are left to member countries to introduce in their domestic legislation as they see fit. Moreover, by its abstract requirement of ‘fair practice’, the *Berne* creates unlimited flexibility for nations in drafting limitations and exceptions for quotation and for teaching and information purposes. However, these limitations and exceptions must comply with the three-step test. It can therefore be concluded that nations can develop the scope of limitations and exceptions for quotation up to the level of fair use.

5.4 SPECIAL LIMITATIONS AND EXCEPTIONS FOR DEVELOPING COUNTRIES

Although the three-step test allows developing countries to expand the scope of copyright limitations and exceptions, the test only helps to promote access and

expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.

⁶⁶⁹ Although the word ‘press’ originally referred to the printing press, the word has been extended to mean electronic press in the digital environment. As a result, reproduction by electronic press services is also covered by Article 10bis(1) of the Convention. See more at von Lewinski, above note 649 at 155.

⁶⁷⁰ Article 10bis(2) of *Berne*:

It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.

dissemination of works domestically.⁶⁷¹ The test cannot help developing countries to facilitate the knowledge transfer or access to advanced knowledge of developed countries. There are special legal regimes of limitations and exceptions designed for developing nations in the Appendix of the *Berne Convention*. Developing countries are permitted to translate and reproduce printed works under strict conditions of compulsory licences. This section demonstrates the compulsory licences for developing countries. The section shows that it is not worthwhile for Vietnam to lean on special limitations and exceptions for developing countries to gain easy or inexpensive knowledge access from industrial countries to promote innovation and development.

5.4.1 Compulsory licences for translation

Article II of the *Berne Appendix* introduces compulsory licences for translation for developing countries. These translation licences apply only to ‘works published in printed or analogous form’.⁶⁷² On the other hand, the licences cannot provide for the translation of works that are manifested in sound recording or digital form.⁶⁷³

Moreover, the licences are non-exclusive and non-transferable. ‘Any national’ of developing countries may apply for a licence. The term ‘national’ is not only natural persons but also ‘covers legal entities, including the state itself, its national or local authorities, and enterprises owned by the states or such authorities’.⁶⁷⁴ Accordingly, it excludes some kinds of legal entities, such as private corporations and charitable organisations.⁶⁷⁵

Additionally, the licences are only applicable in particular situations:

- (1) After a period of three years or any longer period determined by the national legislation of the country, if a translation of the work has not been published in a ‘language in general use’ in that country by the owner of the

⁶⁷¹ Ruth Okediji, ‘Fostering Access to Education, Research and Dissemination of Knowledge Through Copyright’ UNCTAD-ICTSD Dialogue on *Moving the pro-development IP agenda forward: Preserving public goods in health, education and learning* (Bellagio, 29 November – 3 December 2004) 4 <http://www.iprsonline.org/unctadictsd/bellagio/docs/Okideiji_Bellagio4.pdf> (retrieved 10 February 2015).

⁶⁷² The *Berne Convention*, Appendix, art II^s(1); the revised UCC, art V^{ter}(1). Note that in the revised UCC, only ‘writing’ can be covered by the translation licence.

⁶⁷³ Ricketson and Ginsburg, above note 655 at 930; M Ficsor, *The Law of Copyright and the Internet* (Oxford University Press, 2001) 278.

⁶⁷⁴ *Records* 1971, 170.

⁶⁷⁵ Ricketson and Ginsburg, above note 655 at 931.

right of translation, or with his authorisation'.⁶⁷⁶ 'Language in general use' could be a language in general use in 'a given geographic region of country, the language of an ethnic group of the population, or a language 'generally used for particular purposes, such as government administration or education'.⁶⁷⁷ Furthermore, there must be the unanimous agreement of the developed countries in which that language is in general use. Any such agreement must be notified to the Director General by the governments which have concluded it.⁶⁷⁸ In the case of translation into a language which is not in general use in one or more of the developed countries, the three-year period may be shortened by a period of one year.⁶⁷⁹ The shorter period will not apply where the language in question is English, French, or Spanish.⁶⁸⁰

(2) If a translation in the language concerned has been published, but all editions of it are out of print.⁶⁸¹

Furthermore, the licences may only be granted for 'the purpose of teaching, scholarship or research'.⁶⁸² The word 'scholarship' refers not only to instructional activities at all levels in tutorial institutions, primary and secondary schools, colleges, and universities, but also to a wide range of organised educational activities intended for participation at any age level and devoted to the study of any subject.⁶⁸³

However, a licence granted under the Appendix shall be terminated if the owner of the translation right or his authorisation publishes a translation of the work at a reasonable price in the same language and with substantially the same content as the licensed translation.⁶⁸⁴ No licence shall be granted when the author has withdrawn all copies of his work from circulation.⁶⁸⁵

⁶⁷⁶ *Berne Appendix*, art II(2)(a).

⁶⁷⁷ *Records* 1971, 66.

⁶⁷⁸ *Berne Appendix*, art II(3)(b).

⁶⁷⁹ *Berne Appendix*, art II(3)(a).

⁶⁸⁰ *Berne Appendix*, art II(3)(b).

⁶⁸¹ *Berne Appendix*, art II(2)(b). According to Ricketson and Ginsburg, it should only take into account the availability of new copies of the translation on the open market rather than second-hand copies, because the supply of second-hand copies is normally small and uncertain. See more at Ricketson and Ginsburg, above note 655 at 932.

⁶⁸² *Berne Appendix*, art II(5); the revised UCC Article V^{ter}(3).

⁶⁸³ *The Records of the Conference for the Revision of the Universal Copyright Convention*, Paris, 5-24 July 1971, 236.

⁶⁸⁴ *Berne Appendix*, art II(6).

⁶⁸⁵ *Berne Appendix*, art II(8).

The Appendix of the *Berne Convention* art II(9)(a) permits the granting of compulsory licences for making a translation for broadcasting purposes subject to stringent restrictions. First, the translation is made from a lawful copy within the laws of the country granting the licence.⁶⁸⁶ Second, the translation is only used in broadcasts intended exclusively for teaching, or for disseminations of the results of specialised technical or scientific research to experts in a particular profession.⁶⁸⁷ Third, broadcasts and recordings must be lawfully made on the territory of the granting country.⁶⁸⁸ Last, the uses made of the translation are without any commercial purpose.⁶⁸⁹

Article II(9)(b) allows other broadcasting organisations that have their headquarters in the same country to use the sound or visual recordings of licensed translations subject to the consent of the organisation that obtained the original licence. The use must meet all conditions set out for the original licence and cannot be sent outside of the country.

A licence may also be granted to a broadcasting organisation to translate any text incorporated into an audio-visual fixation, where such fixation was itself prepared and published for the sole purpose of being used in connection with systematic instructional activities.⁶⁹⁰

5.4.2 Compulsory licences for reproduction

Article III of the *Berne* Appendix deals with reproduction licences for developing countries. Like the conditions of translation licences, reproduction licences only apply for ‘works published in printed or analogous forms of reproduction’ and such licences are granted for ‘any national’ of the developing country, and they are non-exclusive and non-transferable.⁶⁹¹

In addition, a licence may be granted in particular circumstances. First, five years from the date of first publication of a particular edition of the work or any longer period determined by national legislation, if the copies of this edition have not been distributed in that country to the general public by the owner of the right of

⁶⁸⁶ *Berne* Appendix, art II(9)(i).

⁶⁸⁷ *Berne* Appendix, art II(9)(ii).

⁶⁸⁸ *Berne* Appendix, art II(9)(iii).

⁶⁸⁹ *Berne* Appendix, art II(9)(iv).

⁶⁹⁰ *Berne* Appendix, art II(9)(c).

⁶⁹¹ *Berne* Appendix, art III(1) of the Appendix and Article V^{quarter} of the revised *UCC*.

reproduction or with his authorisation at reasonable price, then a licence may be granted.⁶⁹² However, for the works of ‘the natural and physical sciences, including mathematics, and of technology’,⁶⁹³ the period from the date of first publication of a particular edition of the work is three years. Additionally, for works of ‘fiction, poetry, drama, and music, and for art books’, the period is seven years.⁶⁹⁴ Second, a licence to reproduce and publish an edition which has been distributed may also be granted if, after the expiration of the applicable period, no authorised copies of that edition have been on sale to the general public for six months in the country concerned, or in connection with systematic instructional activities, at a price reasonably related to that normally charged in the country for comparable works.⁶⁹⁵

Like translation licences, a licence granted under the Appendix shall be terminated if the owner of the translation right or his permission publishes a translation of the work at a reasonable price in the same language and with substantially the same content as the licensed translation.⁶⁹⁶ A licence is not to be granted if the author has withdrawn from circulation all copies of the edition in respect of which the application has been made.⁶⁹⁷

Noticeably, the reproduction licences must be for ‘use in connection with systematic instructional activities’.⁶⁹⁸ The general report of the revised *Universal Copyright Convention* (UCC) Conference noted that it was ‘intended to include not only activities connected with the formal and informal curriculum of an educational institution, but also systematic out of school education’.⁶⁹⁹ That is to say, unlike translation licences, the purpose of research is excluded from granting reproduction licences.

Although art III says that reproduction licences only apply to the works ‘published in printed or analogous forms of reproduction’, art III(7) of the Appendix accepts a licence granted for reproduction in audio-visual form subject to the

⁶⁹² *Berne Appendix*, art III (2)(a) and (3).

⁶⁹³ *Berne Appendix*, art III(i).

⁶⁹⁴ *Berne Appendix*, art III(ii).

⁶⁹⁵ *Berne Appendix*, art II(b).

⁶⁹⁶ *Berne Appendix*, art II(6).

⁶⁹⁷ *Berne Appendix*, art IV(Id); the revised *UCC Article V*^{quarter}(1)(b).

⁶⁹⁸ *Berne Appendix*, art II(2)(a).

⁶⁹⁹ *The Records of the Conference for the Revision of the Universal Copyright Convention*, Paris, 5-24 July 1971, 244.

condition that the audio-visual fixations ‘were prepared and published for the sole purpose of being used in connection with systematic instructional activities’.⁷⁰⁰

5.4.3 The ability of developing countries to access copyright works abroad

The *Berne* Appendix was created to establish benefits for developing countries in facilitating access to copyright works in such countries for research and study.⁷⁰¹ Unfortunately, the Appendix has seldom been used,⁷⁰² because the compulsory licence system under the *Berne* Appendix is impractical. The reasons for the uselessness of the Appendix are related below.

First, compulsory licence schemes under the Appendix require a long waiting period before submitting an application. The waiting times are three years or one year after the first publication of the work for translation licences and five years or seven years for reproduction licences. However, after these waiting times the applicant must wait a further six or nine months before the licence is granted.⁷⁰³ The six or nine months waiting period for obtaining the licence is counted after first completing a long procedure (discussed below) to be considered a valid application. Such a long waiting period is unreasonable, as it means the subject matter of the application will be out-dated by the time a compulsory licence is granted.⁷⁰⁴

Second, procedural requirements to grant a compulsory licence are too complicated, risky, and expensive for developing countries. They require that a developing country must make a declaration to the Director General of WIPO at the time of ratification or accession, indicating that it will avail itself of the Appendix.⁷⁰⁵ Following this, the applicants must prove that they requested and were denied a voluntary licence, or they did their best to find the copyright holder but they failed to

⁷⁰⁰ *Berne* Appendix, art III(7)(b).

⁷⁰¹ See more at Ricketson and Ginsburg, above note 655 at 1-49;

⁷⁰² By 2013, only 34 out of 165 contracting countries have, by notifying the Director General of WIPO, availed themselves of the facilities of the *Berne* Appendix. All 34 countries (including Vietnam) availed themselves of both art II and III, except Samoa and Thailand which availed themselves of only art II (translation licences). Only 16 out of 34 countries (including Vietnam) received valid notification. Of the 16 countries with valid notifications, only 9 countries (including Vietnam) have legislation that makes reference to the *Berne* Appendix. See more at WIPO, www.wipo.int/treaties/en/notifications/Berne; P Bernt Hugenholtz and Ruth L Okediji, ‘Conceiving an International Instrument on limitations and exceptions to Copyright’ 170; Strba, above note 501.

⁷⁰³ *Berne* Appendix, arts II(4) and III(4).

⁷⁰⁴ Ruth L Okediji, ‘Sustainable Access to Copyrighted Digital Information Works in Developing countries’ in Keith E Maskus and Jerome H Reichman (eds), *International Public Goods and Transfer of Technology under a Globalized IP Regime* (Cambridge University Press, 2005) 163; Strba, above note 501 at 94.

⁷⁰⁵ *Berne* Appendix, art I(1).

do so.⁷⁰⁶ If the owner of the copyright cannot be found, the applicants must send, by registered mail, copies of their application to the publisher whose name appears on the work and to any national or international information centre which may have been designated, in a notification to that effect deposited with the Director General, by the government of the country in which the publisher is believed to have his principle place of business.⁷⁰⁷ The complexity associated with costs and the time-consuming nature of the application process discourages developing countries. Moreover, the capability of obtaining the licence is uncertain. The application for compulsory licence will be rejected, if, within six or nine months of waiting for the licence, the owner of the translation right makes the translation. That is to say, the complexity, risk, and high cost of the compulsory licence system defeats the purpose of the *Berne* Appendix of facilitating access for developing countries.

Third, the Appendix is even more complicated and expensive in the case of licences for the reproduction of a translated work. It requires the applications of compulsory licences for reproduction and translation to be processed independently, which leads to a compulsory licence on a compulsory licence. A compulsory licence for reproduction will be not granted in two particular cases: (1) where the translation was not published by the owner of the right of translation or with his authorisation; (2) where the translation is not in a language in general use in the country in which the licence is applied for.⁷⁰⁸ This means that the developing country may be granted a licence to reproduce a translation that has been made under a compulsory licence of art II of the Appendix. A developing country has to apply for licences twice to make a book available in those circumstances. A number of developing countries have a language in general use that is not English, Spanish, or French.⁷⁰⁹ Vietnam, for example, contains 51 ethnic groups with different languages, but none of them generally use any of the general language pointed to by *Berne*. This means if Vietnam would like to reproduce a book from developed countries, it obviously has to apply for both compulsory licences: translation and then reproduction. When each

⁷⁰⁶ *Berne* Appendix, art IV(1).

⁷⁰⁷ *Berne* Appendix, art IV (1-2).

⁷⁰⁸ *Berne* Appendix, art III(5).

⁷⁰⁹ The joint UNESCO/WIPO Guidelines on the implementation of the *Berne* Appendix define 'language in general use' as English, French, and Spanish. See more at UNESCO/WIPO Doc UNESCO/WIPO/WG.II/CWA/4 (21 November 1981) Annex A para. 36.

licence is applied for separately, the procedural requirements, costs, and waiting time are doubled. This discourages those countries from seeking compulsory licences.

Last but not least, the special scheme is less attractive for the developing world in the digital environment where knowledge is mostly digitalised, as it is only allowable in printed form. Recent, updated knowledge is commonly stored in digital form. Printed materials often contain out-of-date knowledge and information; thus, they do not help developing countries in the race to increase development.

It has been illustrated that the Appendix is not a useful tool for developing countries to obtain access to advanced knowledge of developed countries. Out of 165 *Berne* country members, only 34 countries⁷¹⁰ (including Vietnam) have availed themselves of the facilities of the *Berne Convention*. Among the 34 countries who have availed themselves of the Appendix, only 16 countries (including Vietnam) received valid notifications⁷¹¹ – the rest have not renewed their notifications. Of the 16 countries with valid notifications, only 9 countries (including Vietnam)⁷¹² have legislation making reference to the Appendix. Significantly, no licence has been granted since the Appendix was established. It is important to acknowledge that the Appendix does nothing for developing countries in facilitating access to knowledge for innovation and development.

The impractical application of the *Berne* Appendix can be explained by the drafting history of the provision. Within *Berne* members, developing countries quickly realised that *Berne* did not help them to gain more access, so enquiries for addressing the access problems of developing countries occurred in the preparation period for the Stockholm Revision Conference. The African Study Meeting Copyright asked for special provisions safeguarding the interests of Africa in 1963.⁷¹³ India submitted a proposal to introduce into *Berne* compulsory licences for

⁷¹⁰ Algeria, Argentina, Bahrain, Bangladesh, China, Cuba, Egypt, Guinea, India, Jamaica, Jordan, Korea, Lesotho, Liberia, Mauritius, Malaysia, Mexico, Mongolia, Niger, Oman, the Philippines, Samoa, Singapore, Sri Lanka, Sudan, Surinam, Syrian Arab Republic, Tanzania, Thailand, Tunisia, United Arab Emirates, Uzbekistan, Vietnam, and Yemen. See more at WIPO <www.wipo.int/treaties/en/notifications/Berne>.

⁷¹¹ Bangladesh, Cuba, Jordan, Korea, Mongolia, Oman, the Philippines, Samoa, Sri Lanka, Sudan, Syrian Arab Republic, Thailand, United Arab Emirates, Uzbekistan, Vietnam, and Yemen. See more at WIPO <www.wipo.int/treaties/en/notifications/Berne>.

⁷¹² Bangladesh, Cuba, Jordan, Sri Lanka, Sudan, Syria, Thailand, United Arab Emirates, and Vietnam. See more at WIPO <www.wipo.int/treaties/en/notifications/Berne>.

⁷¹³ Records of the IP Conference of Stockholm, 1967, Vol 1, Preparatory Document: S/1 (*Berne Convention*), 137.

reproduction for educational purposes and translation, similar to those in the *UCC*.⁷¹⁴ Significantly, 10 developing countries⁷¹⁵ submitted a protocol to further clarify the needs of developing countries and proposed some privileges for developing countries: (1) reservations to the right of translation; (2) reservations to the term of protection; (3) right to protected works for education or scholastic purposes; and (4) compulsory licences for reproduction.⁷¹⁶ The Protocol did not enter into force due to the lack of consensus of both developed and developing countries.⁷¹⁷ WIPO realised that without special rules for developing countries, *Berne* seemed to be less attractive than *UCC*,⁷¹⁸ as developing countries were aware that they might gain nothing at all from joining *Berne*. In an effort to keep developing country members and attract new developing country members, and to minimise the chances of developing countries joining the *UCC*, the solution was to revise *Berne* by adding the Appendix⁷¹⁹ with a focus on facilitating access for developing countries.

In short, the drafting history shows that the access problems in developing countries were recognised from the early stages of *Berne*. The establishment of the *Berne* Appendix was a significant recognition of *Berne* in addressing the problem.

⁷¹⁴ In the years following the adoption of *Berne* 1886, due to significant differences between domestic laws and *Berne*, the United States, Latin American countries, and the Soviet Union (SSSR) were not its members. As a result, the United Nations Educational, Scientific and Cultural Organization (UNESCO) founded after the Second World War, attempted to bring members to an agreement. The Universal Copyright Convention (UCC) was successfully signed in Geneva in 1952. The United States, the SSSR and many *Berne* countries, plus many countries that previously had no copyright, joined the UCC. Approximately 100 countries are currently UCC members. Unfortunately, the UCC has nowadays lost significance, and it will probably not be developed further, as almost all countries of the UCC are either members of, or aspiring members of the World Trade Organisation (WTO) and are bound to sign the *TRIPS Agreement* that connects to the application of *Berne*. See more at J A L Sterling, *World Copyright Law* (Thomson Sweet & Maxwell, 2003) 634; Records of the IP Conference of Stockholm, 1967, Vol 1, Preparatory Document: S/1 (Berne Convention), 138.

⁷¹⁵ Congo (Brazzaville), Congo (Kishasa), Gabon, Ivory Coast, Madagascar, Morocco, Niger, Senegal, and Tunisia. See J A L Sterling, *World Copyright Law* (Thomson Sweet & Maxwell, 2003) 702.

⁷¹⁶ Records of the IP Conference of Stockholm, 1967, Vol 1, Preparatory Document: S/1 (Berne Convention), 140.

⁷¹⁷ Developing countries found that the Protocol was not useful as it required long waiting periods for application. Developed countries also worried that those privileges threatened the existence of copyright protection. See more at Strba, above note 501 at 83-9.

⁷¹⁸ The UCC established the obligation to grant exclusive translation rights to developing countries but permits compulsory licences after periods of three years or one year, under the conditions laid down in the article. Article V^{quater} allows developing countries to grant compulsory licences on the reproduction right after five years or seven years and three years in respect of specially named works under the conditions. See more at Article Vbis (1) of UCC as revised at Paris on 24 July 1971 <http://portal.unesco.org/en/ev.php-URL_ID=15241&URL_DO=DO_TOPIC&URL_SECTION=201.html>; A L Sterling, *World Copyright Law* (Thomson Sweet & Maxwell, 2003) 634.

⁷¹⁹ See more at Ricketson, above note 521 at 124; Strba, above note 501 at 88-91.

However, the Appendix does not bring any benefits for developing countries, except on paper. As a developing country, Vietnam has devoted its best effort to implementing the Appendix; however, the country cannot continue to hope for easy access to knowledge from developed countries through compulsory licences.

5.5 CONCLUDING REMARKS

By the time of the establishment of international copyright law, limitations and exceptions to copyright had existed and varied from country to country due to particular social, economic, and cultural conditions. International treaties acknowledged this diversity and harmonised differences between nations by providing general conditions, called the three-step test, for the application of exceptions and limitations, and leaving national legislators with the freedom to decide if a particular exception or limitation is to be applied and, if this is the case, to determine its exact scope.

The three-step test is the most important provision under international copyright law. The test was originally intended to be sufficiently vague to cover the gamut of national exceptions that already existed in domestic law. The three-step test stipulated by international treaties is, hence, extremely abstract and no formal interpretation is provided, which leads to diverse interpretation. However, the flexibility of the test is an aspect that all interpretations have agreed upon. Although the interpretation of the WTO Panel in the *Section 110(5) case* is accused of being too narrow, the Panel left room for countries to adopt open-ended limitations and exceptions. Other interpretations, such as the policy-based approach and balanced approach, apparently favour the flexibility of the test, which allows countries to expand limitations and exceptions as much as possible, as long as they take into account the interest of the copyright holder. From the first day, the test was deemed to reconcile the differences that existed. Moreover, when putting the test into the general context of conventions it is clear that the test leaves the countries to determine their own limitations and exceptions in compliance with their own conditions. Therefore, the test offers countries great latitude in interpreting their own conformity.

In addition to the three-step test, *Berne* mentions some specific limitations and exceptions – namely quotation and limitations and exceptions for teaching and

information purposes. *Berne* requires nations to introduce quotation as mandatory. Thus, it is implied that in international law the scope of limitations and exceptions depends on the country, and this can start at quotation and go up to the level of open-ended options such as fair use. Additionally, *Berne* leaves nations free to craft their own limitations and exceptions as long as they comply with the three-step test.

The Appendix added into the *Berne Convention* is assumed to be for the benefit of developing countries by providing compulsory licences for translation and reproduction. However, it has never been used in practice, as it is complicated, time-consuming, and expensive to obtain these licences. The *Berne* Appendix has done nothing to help developing countries to expand their ability to access knowledge from the developed world.

This chapter suggests that Vietnam, as a developing country, is only able to rest on the flexibility of the three-step test for providing a broad scope of limitations and exceptions. In order to do that, Vietnam needs to be clever in implementing the three-step test in a way that best serves the above objective. In implementing the three-step test into domestic law, two main approaches of fair use and fair dealing have emerged. Which approach is Vietnam pursuing? Is the approach sufficient to fulfil the knowledge demand of the country in the digital age? Should Vietnam shift to another approach to obtain broader access? The next chapter will investigate limitations and exceptions in the context of Vietnam. It will look at local conditions and needs, its copyright law, and its limitations and exceptions. It will determine whether current limitations and exceptions are too restrictive, and whether they need to be reformed by a proper mechanism.

Chapter 6: Copyright Limitations and Exceptions in Vietnam and the Policy Roadmap for the Future

Equally, the limitations and exceptions contained in the legislation [Vietnam] are scant. There is no private use exception, and minimal provision for libraries and education. This legislation bears all the hallmarks of not having been presented for consultation by consumers, and is already sorely due for reform.

Consumers International⁷²⁰

6.1 OVERVIEW

This thesis has examined whether developing countries are able to follow innovation policy for economic growth and social development by expanding access to knowledge. Copyright limitations and exceptions provide positive support for access to knowledge; hence, they are important for innovation and development. Being a developing country with a high demand for knowledge access and the respect of the public interest rather than privatisation, Vietnam can expand the scope of copyright limitations and exceptions for the purpose of improving innovation and development. The copyright limitations and exceptions of domestic law have been constrained by the three-step test under international law. Fortunately, the test is reasonably flexible. This leaves room for nations to craft limitations and exceptions in compliance with their own conditions and needs. However, current Vietnam limitations and exceptions are problematic. The first section of this chapter demonstrates the shortcomings of the current copyright limitations and exceptions in Vietnam. It argues that present limitations and exceptions to copyright are too restrictive, even more restrictive than those in the past.

Following this, a policy roadmap for the future of copyright limitations and exceptions in Vietnam is considered. An overall policy should be a broad set of copyright limitations and exceptions that promotes innovation and development. This policy must be implemented by removing the constraints and inflexibilities that exist in current limitations and exceptions to copyright in Vietnam. In particular, in forming provisions of limitations and exceptions, the three-step test must be removed

⁷²⁰ Consumers International, 'Vietnam' <<http://a2knetwork.org/reports/vietnam>> (retrieved 20 January 2014).

from legislation, as it has added an extra layer of restriction for limitations and exceptions. It creates two layers of restrictions in application for each particular set of limitations and exceptions, as it requires each set to comply with not only the requirements set out by the limitations and exceptions themselves, but also the three-step test.

The most important part of the chapter examines the possibility of Vietnam adopting a fair use approach in its legislation. Currently, Vietnam adopts the rigid or inflexible fair dealing approach, which makes the law outdated in relation to the new circumstances constantly occurring in the digital age. The closed list of limitations and exceptions lacks numerous important limitations and exceptions for access in the digital age, such as limitations and exceptions for private use, parody or satire, and computer software. The fair use approach should be used as an alternative, as it provides a better set of limitations and exceptions. It is flexible, adaptable and sufficiently predictable, which makes it the best model for the digital age. Therefore, this chapter suggests that Vietnam should adopt fair use in promoting innovation and development in the countries. It can fill the gap of law by the courts, it helps to reduce access costs, and it is also suitable for the Vietnamese legal system and conditions.

New policies should also take place, with substantive limitations and exceptions that support access, including limitations and exceptions for educational use, for libraries or archives, and for disabled people. Such limitations and exceptions are currently typically narrow. They provide limited support for the public to gain lawful access and hurt innovation processes and development. Along with providing criticism of the shortcomings of each of the limitations and exceptions, at the end of each argument regarding limitations and exceptions, suggestions for each point are provided.

The ultimate purpose of this chapter is to provide recommendations for Vietnam, or other developing countries, on ways to utilise copyright limitations and exceptions to progress innovation and development. This begins with a recommendation for future scenarios of copyright limitations and exceptions in Vietnam; that is, a broad scope of copyright limitations and exceptions, which would start by removing the three-step test from legislation. The adoption of ‘fair use’ should be the most important policy to extend the scope of copyright limitations and

exceptions. In addition, some specific copyright limitations and exceptions that provide access for the public, including limitations and exceptions for educational uses, for libraries or archives, and for people with disabilities should be expanded.⁷²¹ At the international level, Vietnam should take a more active role in negotiations that support the broad scope of copyright limitations and exceptions in developing countries. This chapter, therefore, is a significant contribution of the author into the literature.

6.2 COPYRIGHT LIMITATIONS AND EXCEPTIONS IN VIETNAM

Vietnam copyright protection is currently overly strong. This makes its copyright system unbalanced and contrary to its conditions and needs, which stifles innovation and development. Therefore, there is a reasonable expectation that Vietnam should provide broad limitations and exceptions to copyright so that the public is able to enjoy more rights for access to cultural expressions for education, freedom of expression, and public use. However, copyright limitations and exceptions in Vietnam are narrow and restricted. This section discusses provisions of copyright limitations and exceptions to examine whether such provisions can satisfy the expectations of the country. A brief look is taken into limitations and exceptions in the past to examine their breadth, and analysis of current limitations and exceptions is undertaken to show that they are not currently broad enough to support innovation and development.

6.2.1 Copyright limitations and exceptions in the past

The first copyright limitations and exceptions introduced in art 16 of the *Ordinance on Copyright Protection 1994*⁷²² is a closed list of limitations and

⁷²¹Due to the limited length of this thesis, recommendations will concentrate on limitations and exceptions that have important impacts on fostering innovation and development, though the author acknowledges that all limitations and exceptions improve innovation and development in certain ways.

⁷²²Limitations and exceptions created by the *1994 Ordinance* were:

1. Reproductions for private purpose;
2. The extraction from a work is used for the purpose of comments or illustration in another work;
3. The extraction from a work is used in articles, periodicals, radio programs, television programs, documentary films;
4. The extraction of a work is used for the purpose of teaching, testing at educational institutions;
5. The copy of a work is used for archives, libraries;
6. The translation of a work is made from Vietnamese into ethnic minority groups;

exceptions, which is narrow and vague in scope. As reflected by the influence of the French continental civil law system on Vietnamese law, the limitations and exceptions of Vietnam have adopted the fair dealing approach. Although they contained important specific copyright limitations and exceptions, such as for education, libraries or archives, for the blind, and for public use, the application of such limitations and exceptions are restrictive. For example, only one reproduction can be made for personal use. The quotations were restricted to ‘introduction, comments, or enlightenment of questions presented in a work and are not allowed to be the main composition of the new work’.⁷²³ Moreover, listed special cases seem to be examples of exceptional uses, and the *Ordinance* was not clear whether the special cases are merely illustrative examples or are fixed cases that precluded other similar but unstated uses.⁷²⁴ The *Ordinance* was soon repealed by the *Civil Code 1995*.

In the *Civil Code 1995*, copyright limitations and exceptions were covered by arts 760 and 761,⁷²⁵ which seemed to broaden the scope of limitations and

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7. Theatrical works, songs, musical compositions are performed in public cultural entertainments, propaganda – motivation activities;
 8. The live audio-visual recording of a performance is made for the purpose of news reporting or teaching;
 9. Photographs or videos of certain works of fine and applied art works displayed at public places for the purpose of public education or enlightenment;
 10. The translation of a work is made into Braille for blind people.

(Article 16 of the *1994 Ordinance of Copyright Protection*).

It is noted that architectural works in architectural construction form, plastic works and computer software are excluded from the scope of art 16. Also, this provision was provided more detail by the *Decree Guiding the 1994 Ordinance of Copyright Protection*.

⁷²³ Article 14 of the *Decree Guiding the 1994 Ordinance of Copyright Protection*.

⁷²⁴ Lange, above note 158 at 45.

⁷²⁵ Article 760: The limitation of copyright

An individual or organization is entitled to use a work of another which has been published or disseminated, provided that such work is not banned from reproduction and its use is not aimed at business purposes and does not affect the normal exploitation of the work, nor detrimental to other interests of the author or owner of the work; an individual or organization using such work shall not have to ask permission from and pay remuneration to the author or owner, provided that he/she must record or mention the name of the author and the origin of the work.

Article 761: Certain uses of the work that the permission or payment of royalties are not required

1. The use of the work stipulated under Article 760 of the Code includes:
 - a. Duplication of the work for personal use;
 - b. Recitation of the work without misunderstanding the idea of the author in order to criticism or illustration;
 - c. Recitation of the work without misunderstanding the idea of the author in order to write articles, periodicals, radio-television programs, documentary films;
 - d. Recitation of the work without misunderstanding the idea of the author for the purpose of teaching, examining knowledge at schools;
 - e. Reproduction of the work to archive or use in libraries;
 - f. Translation, dissemination of the work from Vietnamese language to the language of ethnic minority groups;
 - g. Perform theatrical works or other artistic performance works during culture, propaganda-motivation activities organised in public;

exceptions. The *Civil Code* added a general rule in art 760, which is similar to the three-step test of *Berne* and similar to factors of the fair use approach of the US. Article 761 provided certain uses that did not require permission and payment of royalties. It raised a question regarding whether art 761 gave some illustrative examples of art 760 or whether it fixed particular cases in application of art 760. No concrete answer has been provided under the law. However, many scholars advocate the former.⁷²⁶ If the former was what legislators wanted, it is likely that Vietnam made a leap from the fair dealing approach to the approach of fair use. Although it was not clear in the legislation, there were signs that lawmakers were hesitant regarding the fair dealing approach and left a way for the fair use approach to be used.

6.2.2 Present copyright limitations and exceptions

Currently, copyright regulations are mostly stipulated in the *Law on IP 2005 (amended in 2009)* – the amended *Civil Code 2005* only retains basic provisions. Copyright limitations and exceptions in the *Law on IP 2005 (amended in 2009)* are double the provisions given previously. They are applied by new regimes of either uncompensated or compensated schemes. However, the real scope of limitations and exceptions is more restrictive than ever before. They hurt innovation and development, as they typically limit access to knowledge for the population, while the country has a high access demand. This argument is explored in the next part of this chapter.

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- h. Audio-visual recording of live performance for the purpose of news reporting or teaching;
 - i. Photographs or videos of certain works of fine and applied art works displayed at public places for the purpose of introduction the images of such works;
 - j. The translation of a work is made into Braille for blind people
2. The uses of the work in Subsection 1 of this Article shall not apply to reproduction of architectural, plastic works and computer programs.

(*Civil Code 1995*, arts 760-71).

⁷²⁶ For example, commentator Thu Anh Nguyen's opinion was that despite not clarifying the relationship between two articles in *Civil Code 1995*, it is deemed to be that art 761 provided some examples to illustrate art 760. See more at Thu Anh Nguyen, 'Vietnam Copyright Case – APAA 2007' <http://www.apaaonline.org/pdf/APAA_54th_council_meeting/copyright_committee/16-1-VietnamGroupCopyrightcase-20071015.pdf>. Frederic P Vimeux, also said that 'the Civil Code expressly approves a certain number of fair uses, *not limited to* critique, comment, news reporting, and education. The following three requirements must be met in Article 760 of the Civil Code in order for fair use doctrine to apply'. See more at Frederic P Vimeux, 'Vietnamese Copyright Laws: Foreign Copyright Owners beware? A Comparative Analysis of its Evolution and Shortcomings' (2000) *Gonzaga Journal of International Law* 3. However, scholar Than Nguyen Luu had the opposite opinion that in satisfaction of art 760: 'the work must be used in a manner specifically provided for in Article 761'. See more at Than Nguyen Luu, 'To Slay a Paper Tiger: Closing the Loopholes in Vietnam's New Copyright Laws' (1996) 47 *Hasting Law Journal* 844.

It is necessary to emphasise that current Vietnamese copyright law does not have any provision referring fair dealing, but its closed list on copyright limitations and exceptions reflects the approach of fair dealing.⁷²⁷ The closed list of limitations and exceptions to copyright are introduced under arts 25(1) and 26(1) grouped in the Appendix of this thesis.⁷²⁸

Additionally, the three-step test of the *Berne* is explicitly set forth under Vietnamese law. Particularly, the use of the work must satisfy three requirements⁷²⁹ (similar to the three-step test of *the Berne Convention*) to qualify for limitations and exceptions to copyright as follows:⁷³⁰

1. The work must be used in one of the special cases provided by law;
2. The use of the work does not affect the normal exploitation of such work;
3. The use of the work does not cause prejudice to the rights of the authors and/or copyright owners.

In summary, it is easy to see why Vietnamese legislators attempted to adopt international standards into its domestic law. However, the adoption is imperfect. It repeats the three-step test verbatim in the law. The simplicity of the limitations and exceptions provisions not only limits the number of applicable limitations and exceptions, but restricts the scope of each of the limitations and exceptions. This issue will be clarified further below.

6.3 WHAT IS THE FUTURE SCENARIO FOR VIETNAM REGARDING LIMITATIONS AND EXCEPTIONS?

This section demonstrates the future of limitations and exceptions in Vietnam. It argues that Vietnam should move towards broad or flexible limitations and exceptions, because the country requires great knowledge access to close the gap with developed countries, to improve education, health, environmental conditions, and in order to comply with aspects of the culture and politics of the country.

⁷²⁷ As said above, this approach was adopted due to the heavy influence of French law, a continental civil law system.

⁷²⁸ See more at the Appendix of the thesis.

⁷²⁹ The second and third conditions can be found in arts 25(2) and 32(2) of the *Law on IP 2005*. It is necessary to note that all articles related to copyright limitations and exceptions are revised in the *Law 2009* in compliance with international standards.

⁷³⁰ The *Law on IP 2005* (revised in 2009), arts 25(2), 26(3), 32(2) and 33(3).

First of all, Vietnam and other developing countries must construct copyright limitations and exceptions in a way that allows governments to pursue the policy aim of closing the knowledge gap with developed countries. In the case of developing countries, such as Vietnam, the *IPR Commission* recommended the following:

In order to improve access to copyrighted works and achieve their goals for education and knowledge transfer, developing countries should adopt pro-competitive measures under copyright laws. Developing countries should be allowed to maintain or adopt broad exemptions for educational, research, and library use in their national copyright laws. The implementation of international copyright standards in the developing world must be undertaken with a proper appreciation of the continuing high level of need for improving the availability of these products, and their crucial importance for social and economic development.⁷³¹

Vietnam has to confront challenges not seen in developed countries, in spite of living in the common landscape of information and communication technological changes. Vietnam suffers from a lack of knowledge to improve education, health, and the environment. Moreover, Vietnam is a net importing country, especially of cultural products, therefore, too-strong copyright protection makes foreign cultural works costly, as well as blocking the flow of information and entertainment of society. It restricts development. Therefore, Vietnam should pursue broad and flexible limitations and exceptions to copyright in order to enjoy space to acquire knowledge at a reasonable price. Doing so facilitates greater production and human development.

Moreover, historical, cultural, economic, social, and political aspects of Vietnam itself need to be considered when constructing proper limitations and exceptions. As described in Chapter Two, Vietnam has its own culture, politics, and level of development. Its culture is shaped by the influence of Confucian ideology, where public interest always prevails over private interest, and private profit has to sacrifice for the group/public benefit. Furthermore, Vietnamese culture encourages knowledge sharing, repetition, and memorisation of knowledge.⁷³² The tremendous influence of Confucius and association with Marxism makes Vietnamese people

⁷³¹ Report of the Commission on Intellectual Property Rights, 'Integrating Intellectual Property Rights and Development Policy' (2002) 104

<http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf> (retrieved 20 July 2012).

⁷³² Snezhina Michailova and Kate Hutching, 'National Cultural Influences on Knowledge Sharing: A Comparison of China and Russia' (2006) 43(3) *Journal of Management Studies* 383, 403; Setsuo Otsuka, 'Why do Asians do well at school?' (1996) 2 *Deep South* 3
<<http://www.otago.ac.nz/deepsouth/vol2no1/setsuo.html#index%20educational>> (retrieved 28 October 2014).

believe that legislation is only regarded if it serves the public benefit. Copyright law is deemed to be the law to protect individual rights; therefore, it is not respected much in implementation. Moreover, as a matter of culture, Vietnamese people have an opinion that the works of prior authors and artist should be available for the next generation, otherwise authors are seen as selfish. In addition, in terms of Vietnam's politics, the socialist policy favours putting more concern on flexible copyright limitations and exceptions, rather than too much protection.

Therefore, overly strong copyright protection in Vietnam is likely impractical and incompatible with the Vietnamese practice of putting societal interests before those of individuals.⁷³³ Instead, flexible or broad limitations and exceptions to copyright would be appreciated.

In addition, Vietnam is not alone in expanding the scope of limitations and exceptions, as the introduction of broad limitations and exceptions has been the apparent policy of developing countries in recent years. It started in August 2004, when Brazil and Argentina proposed establishing an Agenda for Development for WIPO that IP policy must contribute to the development of the country. This proposal eventually turned into the Proposals Related to WIPO Development Agenda (PCDA) including 45 recommendations approved by WIPO in 2007.⁷³⁴ The most significant group of recommendations of PCDA is the third group, centred on technological matters entailing access to knowledge. In this recommendation cluster, WIPO encouraged member states to adopt IP-related policies for promoting and disseminating technology from developed countries to developing countries. Based on this, a number of countries have reviewed their copyright law, and amended or considered amending their laws towards broad limitations and exceptions. Chile, the Philippines, Singapore, Israel, and Thailand, for example, have already extended the scope of limitations and exceptions for the benefit of public interest. Some other countries, such as Brazil, are on the way toward expanding the scope of limitations and exceptions.⁷³⁵

⁷³³ This can be used to explain the fact that copyright infringement in Vietnam is common and people do not feel guilty about piracy. Current expanded copyright law policy is absolutely incompatible with cultural and political characteristics.

⁷³⁴ WIPO, 'Provisional Committee on Proposals Related to a WIPO Development Agenda' (2007) PCDA/4/3.

⁷³⁵ This will be discussed further in the Fair Use or Fair Dealing section of this chapter.

6.4 FORM OF LIMITATIONS AND EXCEPTIONS FOR VIETNAM

In implementing the three-step test, many countries, including Vietnam, are reproducing the treaties' language into their own law, and some countries, including Vietnam, are using it as an additional condition to examine each circumstance of limitations and exceptions. The section argues that this makes the laws not only confusing, but also restrictive; thus, it must be removed from the legislation.

As a requirement of international law, a country needs to unpack the three-step test to form its own limitations and exceptions. It was justified in Chapter Five of this thesis that the three-step test draws a baseline for nations to introduce their own limitations and exceptions.⁷³⁶ It should be regarded as a guiding principle to dictate that member nations write their legislation, rather than used as a strict rule.⁷³⁷ The test needs to be examined by lawmakers – not users, copyright holders, or courts – before introducing certain limitations and exceptions. As a general principle, the three-step test must be unpacked by domestic legislation. In implementing the test, each country has its own method. The three-step test is impliedly addressed in §107 of the *US Copyright Act* of fair use with four factors: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for, or value of, the copyrighted work. Other specific limitations and exceptions of the US have been introduced consistent with the three-step test, although their laws do not mention the test at all. Similarly, Chile⁷³⁸ and Brazil⁷³⁹ created their own exhaustive lists of limitations and exceptions without referring to the three-step test, as the test was carefully examined

⁷³⁶ Section 5.1.4.2 of Chapter Five.

⁷³⁷ Okediji, above note 53 at 32; Max Planck Institute for Intellectual Property, Competition and Tax law, Declaration on a Balanced Interpretation of the Three-Step Test in Copyright law <http://www.ip.mpg.de/shared/data/pdf/declaration_three_step_pdf>.

⁷³⁸ The 2010 *IP Law* of Chile under art 71 Q introduced the fair dealing provision that implemented the three step test as below:

The incidental and exceptional use of a protected work is hereby deemed lawful, for purposes of criticism, commentary, caricature, teaching, scholarship, or research, provided that said use does not constitute a covert exploitation of the protected work. The exception established by this article is not application to audiovisual works of a documentary nature.

⁷³⁹ Pedro Nicoletti Mizukami et al. said that the three-step test 'was not itself turned into law in Brazil'. Brazilian copyright law has no provision directly referring to the three-step test. See more at Pedro Nicoletti Mizukami et al., 'Exception and Limitations to Copyright in Brazil: A Call for Reform' in Lea Shaver (eds), *Access to Knowledge in Brazil: New Research on IP, Innovation and Development* (Bloomsbury Academic, 2010) 50, footnote 10.

by lawmakers before introducing such limitations and exceptions. In Australia, the three-step test was implemented through conditions of fair dealing that: (1) the use must fall within a specific purpose of review or criticism, research or study, news-reporting, judicial proceedings, or professional legal advice, parody or satire; (2) the use must be fair. What is fair will depend on various factors, such as the nature of the work, the nature of the use, and the effect of the use on any commercial market for the work.⁷⁴⁰

The three-step test has not been properly unpacked in Vietnam. Vietnam simply reproduces the treaties' language into its domestic law.⁷⁴¹ Such a use makes the law unworkable, because its meaning is too general. Take the case of s 200AB of the Australian *Copyright Act 1968* as an example. The *Copyright Amendment Act 2006* of Australia was intended to create a flexible exception toward open-ended fair use to enable copyright material to be used for certain socially-useful purposes. Section 200AB allows libraries, archives, galleries, and museums to use copyright materials, provided they are compliant with the three-step test.⁷⁴² In practice, this section has not really worked, as it creates confusion and uncertainty,⁷⁴³ and thus, is not reliable.⁷⁴⁴ The use of the treaties' language undermines the objectives of s 200AB in creating flexible dealing exceptions.⁷⁴⁵

The three-step test of *Berne* creates an additional condition that specific limitations and exceptions must satisfy, as it is inserted at the end of its closed list of limitations and exceptions.⁷⁴⁶ Vietnam's limitations and exceptions are subject to double tests: one test is set up under each particular limitations and exceptions and then has to comply with the second test: the three-step test. In Geiger, Gervais, and

⁷⁴⁰ Anne Fitzgerald and Brian Fitzgerald, above note 318 at 169; Wikipedia, 'Fair dealing and other exceptions in Australia' <http://en.wikipedia.org/wiki/Copyright_law_of_Australia#Fair_dealing_and_other_exceptions>.

⁷⁴¹ See arts 25, 26 of the *Law on IP 2005 (revised in 2009)*.

⁷⁴² The Australian *Copyright Act 1968 (Cth.)*, s 200AB(1)

⁷⁴³ See Nicolas Suzor, Paul Harpur and Dilan Thampapillai, 'Digital copyright and disability discrimination: From braille books to bookshare' (2008) 13 *Media and Arts Law Review* 1 at 8. It was argued that there is no guidance about what is likely to constitute a 'special case', which makes the law uncertain; see also Anne Fitzgerald and Kylie Pappalardo, 'Copyright Law and IP' Report on the Government 2.0 Taskforce: Project 4 (December 2009) 50 <<http://eprints.qut.edu.au/29416/1/29416.pdf>>. It is argued that s 200AB provides insufficient certainty about the meaning of 'special case'.

⁷⁴⁴ Anne Fitzgerald and Kylie Pappalardo, 'Copyright Law and IP' Report on the Government 2.0 Taskforce: Project 4 (December 2009) 50 <<http://eprints.qut.edu.au/29416/1/29416.pdf>>. They argued that it is unreliable and this stems from the uncertainty inherited from *Berne*.

⁷⁴⁵ Ibid at footnote 212; Suzor, Harpur and Thampapillai, above note 743 at 8.

⁷⁴⁶ Articles 25 (2) and 26 (2) of the *Law on IP 2005 (amended in 2009)*.

Senftleben's words, the three-step test 'serves as a further restriction imposed on national limitations and exceptions'.⁷⁴⁷

The Vietnamese situation is similar to the *Chilean IP Law* in 2003. The act of implementing the three-step test by the amendment of *Chilean IP Law 1970* in 2003⁷⁴⁸ brought the legislation into accordance with the Agreements of the WTO, including the *TRIPS Agreements*. Chilean lawmakers added a new art 45*bis* that reproduced the treaties' language.⁷⁴⁹ Article 45*bis* was criticised as 'an extremely unfair test against the very few exceptions authorised by the law'.⁷⁵⁰ It requires the courts to exercise double tests for applying any exception, which is too strict and restricts the scope of limitations and exceptions to copyright.⁷⁵¹ The restriction of the application of limitations and exceptions raised by introducing the three-step test into its legislation was illustrated by the case of *Dao Thai Ton v. Nguyen Quang Tuan*.⁷⁵² In this case, the plaintiff, Nguyen Quang Tuan, claimed the defendant, Dao Thai Ton, had copied the full text of four articles of the plaintiff into the defendant's book '*The Tale of Kieu – Research and Discussion*'. To resolve this case, the court needed to clarify the three-step test added at art 25 (2): whether the right to quote/cite of the defendant has violated the three-step test or not. This means that limitations and exceptions for quotation have to pass two layers of restriction: one from the provision for quotation itself, and one from the three-step test. In this case, the courts had to only determine how much citation of the work is 'reasonable',⁷⁵³ but also interpret three-step test.

Adding the three-step test into legislation makes copyright limitations and exceptions more restrictive and would not allow for the advancement of Vietnam.

⁷⁴⁷ Geiger, Gervais and Senftleben, above note 520 at 617-618.

⁷⁴⁸ Law No. 19.912 in 4 November 2003 available at <<http://www.wipo.int/wipolex/en/details.jsp?id=5321>>.

⁷⁴⁹ Article 45*bis* added by the *Law No. 19.912*:

The exceptions established in this paragraph and in the following paragraph are limited to cases that do not conflict with normal exploitation of the work and do not cause unjustifiable damage to the legitimate interests of the copyright holder

⁷⁵⁰ Daniel Alvarez Valenzuela, 'The Quest for a Normative Balance: The Recent Reforms to Chile's Copyright Law' University of Chile (12 December 2011) <<http://web.uchile.cl/archivos/derecho/CEDI/Art%EDculos/the-quest-for-a-normative-balance-the-recent-reforms-to-chilee28099s-copyright-law.pdf>> (retrieved 17 November 2014).

⁷⁵¹ Ibid.

⁷⁵² This case was initially held by the Hanoi People's Court, following this it was appealed and overruled by the Court of Appeal of the Supreme People's Court. See more at Judgement No. 127/2007/DSPT (14/6/2007) available at <http://www.ecap-project.org/sites/default/files/ip_case_law/VN_1-2-2007.pdf>.

⁷⁵³ Article 25(1)(b).

The three-step test works as a legislative guidance in drafting limitations and exceptions, not as a restriction to be directly adopted in legislation. Therefore, it restricts the application of limitations and exceptions if lawmakers introduce it directly into their legislation. It becomes a burden for both users and courts in exercising limitations and exceptions in practice. Thus, it should be removed from legislation.

6.5 FAIR DEALING OR FAIR USE?

As discussed in Chapter Five, the three-step test of *Berne* provides legislative guidance in drafting limitations and exceptions. It offers the flexibility for nations to introduce limitations and exceptions. Consequently, provisions of limitations and exceptions vary from country to country. However, two main approaches on drafting limitations and exceptions have emerged.⁷⁵⁴ Many countries, such as Germany, France, Australia, the United Kingdom, Canada, and the Netherlands provide case-specific exceptions – fair dealing; while fair use as open-ended provisions has been introduced in the US, Israel and Philippines.⁷⁵⁵ The fair dealing approach lists limitations and exceptions in an exhausted list, whereas fair use refers to an approach that provides a general clause with regard to limitations and exceptions. This section investigates whether fair dealing or fair use is the appropriate approach for Vietnam. The closed-list of limitations and exceptions currently in place in Vietnam shows that Vietnam has adopted the fair dealing approach. However, this section suggests that fair dealing is inflexible, unadaptable, and complicated; therefore, it is not suitable to address the high demand of knowledge access in developing countries like Vietnam. In contrast, the fair use approach – such as in the US – is more flexible, adaptable, and sufficiently certain; it could bring broad access of information and knowledge to Vietnam. This section argues that in comparison with fair dealing, fair use is the best approach for Vietnam in the digital age.

⁷⁵⁴ Robert Burrell and Allison Coleman, *Copyright exceptions: the digital impact* (Cambridge University Press, 2005) 4; Martin Senfleben, “The international three-step test: a model provision for EC fair use legislation” (2010) 1 *JIPITEC* 68; Christophe Geiger, ‘Promoting Creativity Through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright law’ (2009-2010) 12 *Vanderbilt Journal of Ent and Tech. Law* 519.

⁷⁵⁵ Brian Fitzgerald et al, above note 306 at 313; Brian Fitzgerald and Anne Fitzgerald, above note 318 at 37.

6.5.1 Fair dealing

Vietnam, like many other developing countries, adopted the fair dealing approach, where the use must be for one of the specific purposes listed by legislation. There is no general provision for fair dealing. It is characterised by the closed list of limitations and exceptions. This approach is critically argued as too restrictive, rigid, and unadaptable in the digital economy. It is not suitable for Vietnam, a knowledge seeker, to pursue innovation and human development policies.

6.5.1.1. The fair dealing provisions in Vietnamese copyright law

The formulation of the fair dealing approach was first provided for in art 16 of the 1994 *Ordinance on Copyright Protection*⁷⁵⁶ and repeated in the *Civil Code 1995* in arts 760-61,⁷⁵⁷ is currently provided for in arts 25-26 of *The Law on IP 2005 (amended in 2009)* as follow:

Article 25.- Cases of use of published works where permission and payment of royalties and/or remunerations are not required

1. Cases of use of published works where permission or payment of royalties and/or remunerations is not required include:

- a) Duplication of works by authors for scientific research or teaching purpose;
- b) Reasonable recitation of works without misrepresenting the authors' views for commentary or illustrative purpose;
- c) Recitation of works without misrepresenting the authors' views in articles published in newspapers or periodicals, in radio or television broadcasts, or documentaries;
- d) Recitation of works in schools for lecturing purpose without misrepresenting the authors' views and not for commercial purpose;
- e) Reprographic reproduction of works by libraries for archival and research purpose
- f) Performance of dramatic works or other performing-art works in mass cultural, communication or mobilization activities without collecting any charges in any form;
- g) Audiovisual recording of performances for purpose of reporting current events or for teaching purpose;
- h) Photographing or televising of plastic art, architectural, photographic, applied-art works displayed at public places for purpose of presenting images of such works;
- i) Transcription of works into Braille or characters of other languages for the blind;
- j) Importation of copies of others' works for personal use.

2. Organizations and individuals that use works defined in Clause 1 of this Article must neither affect the normal utilization of such works nor cause prejudice to rights of the authors and/or copyright holders; and must indicate the authors' names, and sources and origins of the works.

3. The use of works in the cases specified in Clause 1 of this Article shall not apply to architectural works, plastic works and computer programs.

⁷⁵⁶ Mentioned above at page 41 of this thesis.

⁷⁵⁷ Article 760-61 of the *Civil Code 1995*, above note 725.

Article 26.- Cases of use of published works where permission is not required or but the payment of royalties and/or remunerations is required

1. Broadcasting organizations which use published works in making their broadcasts, which are sponsored, advertised or charged in whatever form, shall not have to obtain permission but have to pay royalties or remunerations to copyright holders according to the Government's regulations.
2. Organizations and individuals that use works defined in Clause 1 of this Article must neither affect the normal utilization of such works nor cause any prejudice to the rights of the authors and/or copyright holders; and must indicate the authors' names, and sources and origins of the works.
3. The use of works in the cases specified in Clause 1 of this Article shall not apply to cinematographic works.

Vietnam's fair dealing provisions limit fair dealing with a copyright work to the purposes of research, teaching, commentary or review, or news reporting. The provisions do not provide for any dealing that can be regarded as 'fair'. The fairness of a particular dealing is only evaluated based on these specific purposes. Where the dealing was for any purpose other than the listed purposes, the defence cannot succeed. Furthermore, when the purpose is one of those listed in the Act, the dealing must pass the test like the three-step test (as stated above at section 6.2.2), and, finally, sufficient acknowledgement must have been given where required by the Act. Failure to undertake any requirements means the fair dealing defence will fail.

6.5.1.2. Fair dealing is rigid and unadaptable to digital technological changes and social needs

Fair dealing is recognised by the closed-ended mechanism, which is inflexible and restrictive, because it provides courts with less flexibility in dealing with new circumstances.⁷⁵⁸ Under fair dealing, what constitutes fairness is determined by permitted purposes. The use for any other purpose is never considered, even though it may be fair. Australia's fair dealing, for example, requires that the dealing must be carried out for one of five specific purposes.⁷⁵⁹ Similarly, Vietnam⁷⁶⁰ provides fair dealing privileges for specific purposes of criticism, commentary, caricature, teaching, scholarship, or research only. The specificity of the fair dealing provisions hinders the courts when dealing with new circumstances that have emerged in the

⁷⁵⁸ Paula Baron, 'The Moebius Strip: Private Right and Public Use in Copyright Law' (2007) 70 *Albany Law Review* 1227, 1232; Fred Von Lohmann, 'Fair Use and Digital Right Management: Preliminary Thoughts on the (Irreconcilable?) Tension Between Them' Electronic Frontier Foundation (2002) 5-6 <https://www.eff.org/files/cfp_fair_use_and_drm_0.pdf>.

⁷⁵⁹ Research or study, criticism or review, reporting news, professional advice given by a legal practitioner or attorney, and parody or satire: ss 40-42, 103A-103C of the *Copyright Act (Cth) 1968*.

⁷⁶⁰ Article 25 (1) of the *Law on IP 2005 (amended in 2009)*.

digital economy. For example, if litigation relating to private consumption uses such as ‘time-shifting’, ‘format-shifting’ or ‘device-shifting’ was brought to the Australian courts before 2006, the courts would have had to conclude that such uses constituted copyright infringement. There was no way for the courts to judge such uses lawfully, as private purpose use was outside the permitted purpose categories clarified by the Act.⁷⁶¹

Due to its rigidity, the fair dealing approach is inadequate to accommodate the numerous exceptional uses that have appeared in the digital age; thus, it should not be used to respond to rapid changes of technologies and practices in the digital era⁷⁶². Specific circumstances identified by the closed list leave no room for the court to consider the development of copyright law, especially regarding digital technologies and the internet. This is especially so in the case of Vietnam. Since the laws were enacted in 2005, the scope of the limitations and exceptions has remained unchanged, while cultural, social, and technological changes happen constantly. As a result, the fair dealing approach is too limited to embrace the new technological and social circumstances that occur.

First, the fair dealing approach is insufficient to deal with the issue of making individual copies of cultural works for private use. Due to the popularity of digital reproduction devices, and the widespread use of the internet in Vietnam⁷⁶³, it has become common for users to copy songs from their lawfully-owned CDs onto an iPod or a MP3 player, or record a TV program for later viewing. It is also commonplace that a person who is eligible to use a copyrighted work would want to

⁷⁶¹ This circumstance would be extremely easy for the US courts, as the fair use doctrine does not restrict any purpose of uses. Particularly, time-shifting was held as fair use in the early digital technology era in the case: *Sony Corp. v. Universal City Studios, Inc* (1984) 464 U.S. 417, 412. Under fair use, the courts are allowed to play an active role in adapting US copyright law to major changes in technology. This will be discussed in more depth below.

⁷⁶² The Copyright Law Review Committee (CLRC) quickly recognised the limitations of fair dealing provisions in the Simplification Reference (1995-1999). See at CLRC, *Simplification of the Copyright Act 1968*, Part I

<[http://www.nationalsecurity.gov.au/www/agd/rwpattach.nsf/VAP/\(756EDFD270AD704EF00C15CF396D6111\)~CLRC+Simplification+of+the+Copyright+Act+1968+-+Part+1.pdf/\\$file/CLRC+Simplification+of+the+Copyright+Act+1968+-+Part+1.pdf](http://www.nationalsecurity.gov.au/www/agd/rwpattach.nsf/VAP/(756EDFD270AD704EF00C15CF396D6111)~CLRC+Simplification+of+the+Copyright+Act+1968+-+Part+1.pdf/$file/CLRC+Simplification+of+the+Copyright+Act+1968+-+Part+1.pdf) > (retrieved 25 December 2013); Emily Hudson, ‘Implementing Fair Use in Copyright Law: Lessons from Australia’ (2013) *IP Journal* 25(3) 201, 208; Brian Fitzgerald et al, *Internet and E-commerce Law: Business and Policy* (Lawbook Co., 2011) 316.

⁷⁶³ According to statistics in the 2010 Ministry of Information and Communications of the Socialist Republic of Vietnam, 30.2 million people use mobile phones (37.5%), 2.5 million households own personal computers (12.6%) and 12.5 million citizens have access the internet (14.6%). See <http://netcodo.com.vn/khoahoccongnghe/201110/33-nguoi-dan-nong-thon-dung-di-dong-2101959/> > (retrieved 11 January 2014).

share the recordings with members of his or her family or household. Such popular uses are tolerated by the copyright owners who consider that such acts do not prejudice their potential market of the works. However, these acts are considered to infringe on copyright, as reproductions for private use (time-shifting and format-shifting) have not been included in the closed list of limitations and exceptions in Vietnamese copyright law.⁷⁶⁴ Moreover, making political speeches or making fun of politicians through parody or satire⁷⁶⁵ has become a type of entertainment or creative play in Vietnamese modern society due to the rapid development of internet websites and social media such as Twitter, Facebook, and Weibo.⁷⁶⁶ A number of images, songs, books, movies, and political speeches have been creatively reproduced, modified, and shared on social media platforms.⁷⁶⁷ Parody or satire enhances freedom of expression.⁷⁶⁸ It is considered ‘not only to have entertainment value, but also to serve a critical function, pointing out human imperfections and the ironies of our existence’.⁷⁶⁹ In order to construct a democratic society, it is essential that citizens are permitted to critique government practices and policies. It is necessary to note that personal uses of time-shifting and format-shifting completely comply with the three-step test addressed in Vietnamese copyright law. Particularly, they are non-commercial or non-profit activities, because they merely allow a viewer to see a work that he had been invited to witness lawfully. The fact the work is reproduced

⁷⁶⁴ Vietnamese copyright law allows individuals to reproduce only one copy of a work for non-commercial purposes of either scientific research or teaching at art 25(1) (a) of the *Law on IP 2005 (amended in 2009)*. It does not mention reproduction for self-entertainment or private enjoyment; therefore, it is prohibited to make a copy of a song, music, or other works for time-shifting, format or device-shifting.

⁷⁶⁵ Parody is defined as ‘a literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule’. For example, an art student draws her/his own version of a Van Gogh portrait, using elements of both the drawing of Van Gogh and the setting that parodies Van Gogh as a funny man. Satire, differently, is the use of humour, irony, exaggeration, or ridicule to expose and criticise people’s stupidity or vices, particularly in the context of contemporary politics and other topical issues. For example, a person creates lyrics to be sung to the tune of a famous song. The lyrics lampoon a current political issue in a satirical way. Both parody and satire draw on other works and may imitate them, use excerpts from them, and make them humorous. New Oxford English dictionary online <http://oxforddictionaries.com/definition/satire?q=satire,_parody> (retrieved 11 January 2014).

⁷⁶⁶ Patrick Sharbaugh and Dang Nguyen, ‘Make lulz, not war: How online remix and meme culture are empowering civic engagement in the Socialist Republic of Vietnam’ (paper presented at the 2014 ICA Regional Conference, Brisbane, 01-03 October 2014) available at <https://www.academia.edu/5782060/Make_lulz_not_war_How_online_remix_and_meme_culture_are_empowering_civic_engagement_in_the_Socialist_Republic_of_Vietnam> (retrieved 9 March 2015).

⁷⁶⁷ Ibid.

⁷⁶⁸ John C Knapp, ‘Laugh, and the whole world...scowls at you?: A defense of the United States’ fair use exception for parody under TRIPS’ (2004-2005) 33 *Denv.J. Int’ L L. and Pol’y* 354.

⁷⁶⁹ Guibault, above note 460 at 9.

does not influence ordinary exploitation of the work.⁷⁷⁰ The use does not affect the author's interest, as it is used for non-profit activity. It causes no actual present and future harm for the copyright owner, other than to allow more people to view broadcasts or to listen to music works. Hence, it might facilitate the dissemination of knowledge and foster the advancement of technologies. In addition, time and format-shifting is acceptable as a copyright exception in many countries. For instance, in the US, the court held that time-shifting was a fair use in the 1984 *Sony* case.⁷⁷¹ Likewise, space or format-shifting for personal, non-commercial use – such as ‘ripping’ an audio CD – is considered fair use based on the 1984 Betamax decision and the 1999 Rio MP3 player decision in the *Recording Industry Ass’n of America (RIAA) v. Diamond Multimedia*⁷⁷² case. In Australia, the time-shifting exception is stipulated in s 111 of the *Copyright Act 1968 (Cth)*.⁷⁷³ It is not an infringement to make a cinematograph film or sound recording of a broadcast merely for private or domestic use. Moreover, the legal user of the copyright work is eligible to lend it to a member of the lender's family or household for the private and domestic use of that person.⁷⁷⁴ The device and format-shifting exception for private and domestic use also appears in the Australian *Copyright Amendment 2006 (Cth)*, ss 43C, 47J, 109A and 110AA. Section 70 of the *Copyright, Design and Patent Act 1988* of the United Kingdom⁷⁷⁵ covers the exception for time-shifting of domestic and personal use.

Second, the closed list of the fair dealing approach does not provide any opportunity to extend the scope of limitations and exceptions to parody or satire. Parody is considered not only to have entertainment value, but also to serve as a critical function, pointing out human imperfections and the ironies of our existence. Encouraging the production of parodies is one of society's values, as it constitutes an important artistic vehicle through which creators and critics exercise freedom of expression,⁷⁷⁶ which is the core element of democracy. Moreover, parody or satire

⁷⁷⁰ *Sony Corp. of America v. Universal City Studio, Inc* 464 USE 417 (1984).

⁷⁷¹ 464 USE 417 (1984). See above in Chapter Four of this thesis.

⁷⁷² 180 F. 3d 1072, 1079, 9th Circ (1999).

⁷⁷³ The *Copyright Amendment Act 2006* repealed the old s 111 and inserted a new s 111 in its place. The new section introduces the time-shifting exception under the name of ‘Recording broadcasts for replaying at more convenient time’.

⁷⁷⁴ Section 111(4) of the Australian *Copyright Act 1968 (Cth)*.

⁷⁷⁵ Available at Intellectual Property Office of the United Kingdom
<http://www.ipso.gov.uk/cdpact1988.pdf>.

⁷⁷⁶ Ginsburg J C, ‘Toward Supranational Copyright Law? The WTO Panel Discussion and the “Three-Step-Test” for Copyright’ (2001) 187 *Revue Internationale du Droit d’Auteur* 2, 9.

promotes cultural diversity by permitting humorous expressions of cultural works.⁷⁷⁷ The *Berne* has no specific reference to parody or satire. However, making reproductions for the purpose of parody or satire possibly complies with the three-step test of *Berne*,⁷⁷⁸ as it does not compete with the original works because it appeals to different audiences and often appears in a different place and a later time.⁷⁷⁹ In Vietnam, online remix culture has become popular in the last decade.⁷⁸⁰ According to Patrick and Nguyen, ‘new practices of participatory online culture, such as the creation and dissemination of remix and visual memes, are providing cover for political discourse and social commentary in Vietnam’.⁷⁸¹ Thousands of remix products are made and disseminated via social media such as Facebook, Twitter, YouTube, and blogs. Most of them are political comments, harmless humour, or social critique.⁷⁸² Obviously, a number of those products are reproduced or transformed from copyright works without the permission of copyright holders. In the absence of limitations and exceptions for parody or satire, such transformative products are deemed to infringe copyright. The current exhaustive list of limitations and exceptions of Vietnam do not cover reproductions for parody or satire; therefore, this might prevent the human capability to control their environment, one out of the 10 central capabilities of human development drawn by Martha Nussbaum.⁷⁸³ Recently, the US courts included parody or satire under the fair use doctrine.⁷⁸⁴ A number of other countries have recently included it in their limitations and

⁷⁷⁷ *Laugh It Off Promotion CC*, Case No. CCT 42/04 para 86.

⁷⁷⁸ L Guibault and P B Hugenholtz, ‘The Nature and Scope of Limitations and Exceptions to Copyright and Neighbouring Rights With Regard to General Interest Missions for the Transmission of Knowledge: Prospects for Their Adaptation to the Digital Environment’ (December 2003) *UNESCO Copyright Bulletin* 9.

⁷⁷⁹ S Hannabus ‘Inspiration or infringement: Parody and the law’ (2002) 1 *Library Review* 51, 79-89 <<http://search.proquest.com/docview/218295638?accountid=13380>>.

⁷⁸⁰ Patrick E Sharbaugh and Dang Nguyen, ‘Make lulz, not war: How online remix and meme culture are empowering civic engagement in the Socialist Republic of Vietnam’ (3 October 2014) *ICA Brisbane Conference* available at <https://www.academia.edu/5782060/Make_lulz_not_war_How_online_remix_and_meme_culture_are_empowering_civic_engagement_in_the_Socialist_Republic_of_Vietnam> (retrieved 13 October 2014).

⁷⁸¹ Sharbaugh and Dang Nguyen, *ibid*.

⁷⁸² Sharbaugh and Dang Nguyen, *ibid*.

⁷⁸³ Nussbaum, above note 19 at 34.

⁷⁸⁴ In the *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569 (1994), the Supreme Court decided that fair use doctrine protected parody as well.

exceptions, such as the United Kingdom,⁷⁸⁵ Spain,⁷⁸⁶ the Netherlands,⁷⁸⁷ and France.⁷⁸⁸

Third, closed-list limitations and exceptions cannot create a way for users to legally access computer software source codes for study purposes (reverse engineering), which has occurred in recent years and this might impede innovation in this field. Vietnam's software development industry has been booming in the last five years. Companies like Intel, Samsung, and LG have invested billions in the country's electronics manufacturing industry.⁷⁸⁹ The information technology sector was expected to contribute 8-10 % of GDP by 2020.⁷⁹⁰ This plan will become true if 250,000 information technology workers study cutting-edge technologies.⁷⁹¹ In the computer software industries, workers need to absorb ideas created around the world and then develop them into new software. Moreover, computer software products quickly become obsolete; thus, competitive preference is only achieved by someone who quickly develops them. Time delays occur if developers are prohibited from learning about existing software. This restrains the development of follow-up innovation or inter-operating applications through reverse engineering. Therefore, if Vietnam's limitations and exceptions extend to the making of a reproduction of a computer program for the purpose of studying the ideas behind the program, and the way in which it functions, it will facilitate competition and growth in the computer software industry. Unfortunately, the restricted fair dealing approach will not allow for these limitations and exceptions unless a change is made to the legislation.⁷⁹²

⁷⁸⁵ Samsung Xiaoxiang Shi, 'Chinese Copyright law, peer production and the participatory media age: an old regime in a new world' in Brian Fitzgerald ed., *Copyright law, digital content and the Internet in the Asia-Pacific* (Sydney University Press, 2008) <http://ses.library.usyd.edu.au/bitstream/2123/2359/1/CopyrightAsiaPacific_Ch13.pdf>.

⁷⁸⁶ Ellen Gredley and Spyros Maniatis, 'Parody: A Fatal Attraction? Part 1: Nature of Parody and its Treatment in Copyright' (1997) 19 *European Intellectual Property Review* 339.

⁷⁸⁷ P Bernt Hugenholtz, 'Copyright and Freedom of Expression in Europe', in Rochelle Cooper Dreyfuss et al, eds., *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford University Press, 2001) 343, 357 cited by John C Knapp, 'Laugh, and the whole world...scowls at you?: A defense of the United States' fair use exception for parody under TRIPS', *Denv. J. Int'IL. and Pol'y* 33 (2004-2005) 347, 364.

⁷⁸⁸ John C Knapp, 'Laugh, and the whole world...scowls at you?: a defense of the United States' fair use exception for parody under TRIPS', *Denv. J. Int'IL. and Pol'y* 33 (2004-2005) 347, 364.

⁷⁸⁹ Hawkins Pham, 'Computer Science in Vietnam: Counting Down to The Hour of Code' *Forbes* (online), 18 December 2014 <<http://www.forbes.com/sites/techonomy/2014/12/18/4560/>> (retrieved 10 March 2015).

⁷⁹⁰ Ibid.

⁷⁹¹ Ibid.

⁷⁹² It is different from the fair use approach of the US where reverse engineering was allowed in the case of *Atari Games Corp. v. Nintendo of America, Inc* 975 F.2d 832 (Fed. Cir. 1992). There, the

6.5.1.3. *The predictability of fair dealing*

The advocates of fair dealing have pointed to research indicating that fair dealing is precise and certain because it has detailed rules. Fair dealing is restricted to an exhaustive set of purposes, and comprises certain types of works, making the scope of fair dealing certain and predictable.⁷⁹³ Thus, the courts are unable to interpret fair dealing using their own personal perspective. They cannot extend the scope of application themselves, or add new purposes to it. This must be done by Parliament. Martin Brenncke posited that ‘fair dealing provisions provide for legal certainty through a catalogue of specifically defined exceptions that can only be enlarged by Parliament’.⁷⁹⁴ He argued that the fair dealing approach is precise because it has been stipulated by Parliament, a professional constructing legislation body, so it will minimum or avoids errors.⁷⁹⁵

However, recent research has raised doubts about the uncertainty and unpredictability of fair dealing, as it can be difficult to determine if a particular use falls into one of the specified purposes. The fair dealing approach does not allow the court to go outside the box that was crafted by legislation. Therefore, to ensure certainty, the law has to interpret every detail of each particular purpose, as well as concepts and other relevant provisions. Lawmakers hope such detailed provisions are able to embrace all practices. Unfortunately, a complex set of rules set up in legislation makes the law more complex and difficult to understand for the public. This happens in many countries. For example, the limitations and exceptions in Australia have been presented well in legislation, but still contain unclear aspects. In the *TCN Channel Nine v Network Ten Ltd*⁷⁹⁶ case, the court had to spend a significant part of the judgment focussing on the question of whether the use of clips

court held that ‘reverse engineering object codes to discern the unprotectable ideas in a computer program is a fair use’. In the *Sega Enterprises Ltd. V. Accolade, Inc* 977 F. 2d 1510 (9th Cir. 1992) the court reached a similar conclusion that making intermediate copies of software’s code to study and understand the code was fair use. See more at Robert H Lande and Sturgis M Sobin, ‘Reverse Engineering of Computer Software and the US Antitrust Law’ (1996) 9 (2) *Harvard Journal of Law and Technology* 237, 245.

⁷⁹³ Australian Law Reform Commission (ALRC), ‘The Case for Fair Use’ In Copyright and the Digital Economy (ALRC Report 122, 13 February 2014) <<http://www.alrc.gov.au/publications/4-case-fair-USEe/fair-USEe-sufficiently>> (retrieved 20 March 2015).

⁷⁹⁴ Martin Brenncke, ‘Is “fair use” an option for U.K. copyright legislation?’ (Inst. für Wirtschaftsrecht, 2007) 13 available at <<http://www.wirtschaftsrecht.uni-halle.de/sites/default/files/altbestand/Heft71.pdf>> (retrieved 26 November 2013).

⁷⁹⁵ Ibid.

⁷⁹⁶ (2002) 118 FCR 417.

in an entertainment show constituted the use for the purpose of criticism/review or the purpose of reporting news. In addition, the unpredictability was expressed in the case of *National Rugby League Investments Pty Ltd v Singtel Optus*,⁷⁹⁷ where Optus believed that time-shifting for private use was not copyright infringement, so Optus invested in the TV Now recording service that allows customers to save sports broadcasts for later view. Optus justified that it could provide that service on behalf of individuals. However, the Full Federal Court said Optus infringed copyright because the time-shifting exception in s 111 of the *Copyright Act 1968* does not mention commercial copying on behalf of individuals. Similarly, in Vietnam, many phrases of the limitations and exceptions are not defined, which makes the law unclear. For example, the law does not make it clear how much is reasonable citation for commentary or illustrative purpose. This led to serious litigation between a Han Nom literature researcher, Nguyen Quang Tuan, and his colleague in the case *Dao Thai Ton v. Nguyen Quang Tuan*.⁷⁹⁸ The defendant inserted four articles of the plaintiff verbatim and had comments in the notes below each page of the articles. The defendant believed that such citations were reasonable citation for the purpose of commentary. However, the plaintiff said that the use of the full text of four articles could not be considered a reasonable quote. This uncertainty is exposed by courts. The Hanoi People's Court based on the view of the General Office of Copyright⁷⁹⁹ gives the opinion that 'reasonable citation means only part of the works is reproduced'.⁸⁰⁰ In contrast, the Supreme Appellate Court held that full text reproduction is allowable.⁸⁰¹ Therefore, the fair dealing approach does not provide a high level of certainty or predictability.

6.5.2 Fair use

Generated by US case law,⁸⁰² and then codified⁸⁰³ by the US Congress, fair use is a statutory provision that provides that the use of the work does not infringe

⁷⁹⁷ (2012) 201 FCR 147.

⁷⁹⁸ This case was initially held by the Hanoi People's Court, following this it was appealed and overruled by the Court of Appeal of the Supreme People's Court. See more at Judgement No. 127/2007/DSPT (14/6/2007) available at http://www.ecap-project.org/sites/default/files/ip_case_law/VN_1-2-2007.pdf.

⁷⁹⁹ This government agent drafts the Copyright Act and its guidelines.

⁸⁰⁰ *Dao Thai Ton v. Nguyen Quang Tuan* Judgement No. 68/2006/DSST.

⁸⁰¹ Ibid.

⁸⁰² The fair use doctrine was firstly generated in the case of *Folsom v. March* 9F. Cas. 342 (1481) and was then codified into the *U.S. Copyright Law* Section 107.

⁸⁰³ The *US Copyright Act 1976*, s 107.

copyright if it is fair. Whether the use is fair is examined based on fairness factors.⁸⁰⁴ The structure of fair use is shaped in a flexible and open-ended manner, but still ensures some degree of certainty and predictability in its application. It is adaptable in new circumstances without changing legislation; thus, it might be a more suitable model of limitations and exceptions in the digital age where technologies and social life change rapidly. This section demonstrates fair use's flexibility and adaptability, as well as its certainty, to justify that fair use is the best model in the digital age for Vietnam.

6.5.2.1. US fair use doctrine

The fair use defence is a judge-made law based on the 1891 case of *Folsom v. Marsh*, where the defendant reproduced private letters of George Washington. Justice Story indicated some factors to conclude that such use is fair use: that 'a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism'.⁸⁰⁵ Over time, the factors recognised in *Folsom v. Marsh* case – including nature, value, and the extent of taking – were expanded by the courts and then ultimately codified in s 107 of the US *Copyright Act 1976*. There are two parts in s 107: first, it provides some examples of fair use; second, it introduces four factors of fair use.

Unlike the fair dealing approach, the Preamble of s 107 of the US *Copyright Act 1976* provides some exemplars of fair uses, such as criticism, comment, news reporting, teaching, scholarship, and research. Additionally, the Supreme Court said

⁸⁰⁴ Section 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;

and

- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Section 107 of the US *Copyright Act 1976* <<http://www.copyright.gov/title17/92chap1.html#107>>.

In fact, the fair use provision is a doctrine originated by case law prior to the *Copyright Act 1976*. It was initially originated in a decision by Justice Story in the 1841 case *Folsom v. Marsh* 9F. Cas. 342 (C.C.D. Mass. 1841) with the idea about 'abridgments of copyrighted works that were deemed fair' and then developed into the fair use doctrine in the 1869 case *Lawrence v. Dana* 15F. Cas. 26 (C.C.D. Mass. 1869) before becoming part of the *Copyright Act 1976*. See more at Matthew Sag, 'The Pre-History of Fair Use' (2011) 76 *Brook Law Review* 1371.

⁸⁰⁵ *Folsom v. Marsh* 9F. Cas. 342 (C.C.D. Mass. 1841) (no.4,901) at 344.

that the categories of fair use are open-ended or never closed, although it is pretty rare for the court to find new type of fair use. This means that fair use enables the courts to expand the purposes of use as and when it deems reasonable..

In regard to the four factors of fair use, the Act has not provided guidance, but left the court to clarify this by case law. The first factor is the purpose and character of the use, including whether it was a commercial nature. This factor examines whether the use is for the purpose listed in the Preamble of s 107. If the use is for one of the listed purposes, then the court will generally favour the defendant even though the use is commercial.⁸⁰⁶ According to Patterson and Lindberg, the first factor is satisfied if that use is: (1) for non-profit educational purpose; (2) to make critical, social or political commentary; (3) to further the cause of learning.⁸⁰⁷ Particularly, uses are more likely to be fair if they are transformative or productive use or parody. A transformative use is one where a user changes the work for new utility. For example, using images of magazine covers for historical reasons;⁸⁰⁸ copying of an entire photo in conjunction with commentary about that photo⁸⁰⁹; and superimposing an actor or politician's face on a copy of a famous photograph for the purpose of parody⁸¹⁰ are held to be fair uses. It is important to note that such purposes are not automatically deemed fair use – the other three factors must be considered together.

The second factor is the nature of the copyright work. This factor tends to favour the copyright owner if the work is a fictional or highly expressive work, but will favour the user if the work is factual or not highly expressive.⁸¹¹ Moreover, in *Harper & Row*⁸¹², a case that dealt with President Ford's unpublished autobiography, the Supreme Court held that a magazine could not abstract the interesting parts of the president's forthcoming autobiography, although the information was historical, because the magazine did not only use the factual record but President Ford's expressed language from the autobiography.

The third factor is the amount and substantiality of the portion used of the work. This factor examines how much the work is used. Whether the amount used is

⁸⁰⁶ Dan Hunter, *The Oxford Introductions to US Law: Intellectual Property* (Oxford University Press, 2012) 71.

⁸⁰⁷ L.Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright: A Law of Users' Rights* (The University of Georgia Press, 1991) 201.

⁸⁰⁸ *Warren Publ'g Co. v. Spurlock*, 645 F. Supp. 2d 402 (E.D. Pa. 2009).

⁸⁰⁹ *Nhez v. Caribbean Int'l New Corp.*, 235 F. 3d 18 (1st Cir. 2000).

⁸¹⁰ *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998).

⁸¹¹ Dan Hunter, above note 806.

⁸¹² 471 US 539 (1985).

reasonable must be determined in light of the size of both the copyrighted work and the work in which it is used, and the economic effect of the portion taken to both works,⁸¹³ because the qualitative assessments are as important as quantitative ones.⁸¹⁴ The amount of the work used will be considered by the court as fair use if it is a small quantity or if the portion used is not central or significant to the entire work. In contrast, the court will reject as a fair use if the portion used is central to or the heart of the original work.⁸¹⁵ This factor creates freedom for the courts to find in favour of either the plaintiff or the defendant. In the *Harper & Row* case, for example, the use of 1% of the quotation from President Ford's autobiography was found by the court to be significant because it represented 13 % of the defendant's article.

The fourth factor is the effect of the use upon the potential market for or value of the copyright work. This factor examines whether the defendant's use destroys the value or supplants the potential market for the plaintiff's work. This factor requires the courts to consider not only the extent of market harm caused by the use, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant...would result in a substantially adverse impact on the potential market for the original'.⁸¹⁶ Patterson and Lindberg suggest that the courts should consider one or more factors among six factors, including accessibility of the work, date of the work, economic life of the work, availability of copies on the market, price of the work, and the evidence of abandonment to determine whether the fourth factor is satisfied.⁸¹⁷

⁸¹³ L.Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright: A Law of Users' Rights* (The University of Georgia Press, 1991) 203.

⁸¹⁴ Hunter, above note 806.

⁸¹⁵ Bill Graham Archives, *LLC v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

⁸¹⁶ Campbell, 510 U.S. at 590.

⁸¹⁷ Patterson and Lindberg recommended that the courts should consider following factors

- a. Accessibility of the work. This factor is relevant to the electronic media, that is, if works are available in published form.
- b. Date of the work. It is evidence of its accessibility. For example, a twenty year old text, a nine moth old magazines or a three week old newspaper can be fair use if a teacher reproduce them for a class.
- c. Economic life of the work. It is relevant in cases of newspapers, television newscasts, and the broadcast of sporting events. For example, a live sporting broadcast is reproduced substantial portions one month after initial broadcast may be seldom harmful to the interest of the copyright owner.
- d. Availability of copies on the market. It is relatively relevant to accessibility. If a work is publicly disseminated in copies but then disappears from the markets, the use of the book may be subject to fair use. Indeed, in some circumstances, the work is no longer available to purchase because the publisher has destroyed the original, the reproduction of substantial portion of the work causes very little loss for the copyright owner.

6.5.2.2. Fair use is flexible and adaptable to digital technological changes and social needs

Unlike fair dealing, which is confined to prescribed purposes or types of use, fair use is flexible because it provides factors to determine which use is fair. These factors include the purpose and character of the use and any harm that might be done to a rights-holder's interests by that use.⁸¹⁸ It is broadly applicable to all kinds and uses of copyrighted work, regardless of any specific purposes, as long as such uses satisfy four factors. The list of the specific examples of fair use – such as criticism, comment, news reporting, teaching, scholarship, or research – is non-exclusive. The list has been broadened over time by the courts. Take the case of reverse engineering of computer programs as an example. Reverse engineering always requires deconstructing the original program's literal code. In doing so, it can create compatible and interoperable programs that may contain code from the original program. Therefore, to some extent it may constitute copyright infringement. However, thanks to the flexible and broad meaning of fair use, reverse engineering had been defended.⁸¹⁹ Moreover, fair use is only limited to those uses that the court has previously affirmed and new uses cannot evolve.⁸²⁰ Hence, under the general and flexible terms of fair use, a creator may dare to make some use of another's work that he/she believes to be fair. If the copyright owner agrees, the use continues, otherwise she/he can call on the courts to intervene and rule on the case. The *Sony* case is another example. Under the belief of fair use, in 1975 Sony produced and released a recording tool called the Betamax VCR for home taping of television programs for

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- e. Price of the work. This factor is considered to ensure that the copyright owners do not abuse the monopoly rights granted to make their works too pricey. If the price is reasonable to public, the reproduction of the work without permission shall be not subject to fair use.
 - f. Evidence of abandonment. If the user have evidence that he or she devotes demonstrably reasonable effort to obtain consent but fail to be authorized, abandonment will almost sure to be a fair use.

See L.Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright: A Law of Users' Rights* (The University of Georgia Press, 1991) 204-07.

⁸¹⁸ See s 107 of the US *Copyright Act 1976*.

⁸¹⁹ Currently, the reverse engineering exception is covered by s. 1201(f) of the US *Copyright Act*, introduced by the *Digital Millennium Copyright Act 1998*. However, before codifying this provision, the US courts had held it as a finding of fair use. For example, the cases of *Sega Enterprises Ltd v. Accolade, Inc.* 977 F2d 1510 (9th Cir. 1992); *Atari Games Corp v. Nintendo of America, Inc.*, 975 F2d 832 (Fed. Cir. 1992); *Handa, McGill L.J.* 40 (1995), 621 (684).

⁸²⁰ Fred Von Lohmann, 'Fair Use and Digital Right Management: Preliminary Thoughts on the (Irreconcilable?) Tension Between Them' Electronic Frontier Foundation (2002) 3 <https://www.eff.org/files/cfp_fair_use_and_drm_0.pdf>.

later viewing (time-shifting). In 1976, copyright owners, such as Universal City Studios and the Walt Disney Company, sued Sony for providing a tool of piracy. The Supreme Court ruled in 1984 that time-shifting constituted fair use. Therefore, flexible fair use operates as a ‘safety valve’ between copyright and new technologies.⁸²¹ It plays an important role in preserving a space for innovation and development.

Additionally, fair use gives the courts ultimate discretion by imposing only four factors, which makes the law easily adaptable to new circumstances without legislation. Fair use was a judicial doctrine codified by the Congress merely ‘to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in anyway’.⁸²² This means that by the time of its codification, Congress intended to leave it to the courts’ discretion to decide fair use based on the facts of each case. Each case raising the question of fair use has to be decided based on its own facts. The House of Representatives, hence, made it clear that:

The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case by case basis.⁸²³

Fair use doctrine, thus, is regarded as an embodiment of ‘law and fact’.⁸²⁴ It enables the courts to apply an endless variety of cases and can be adapted to new situations through case-by-case development.

In practice, what constitutes fair use is developed over time via case law. Throughout the history of the doctrine, its scope has been expanded by the courts. In legislation, fair use is justified for several purposes, such as criticism, comment, news reporting, teaching, scholarship, or research. It was then extended to time-shifting private use by the *Sony Corp. of America v. Universal City Studios, Inc.*⁸²⁵ case when Sony introduced a new product called the Betamax videotape recorder (VTR) that allowed users to copy broadcast television programs to playback at later

⁸²¹ Ibid.

⁸²² HR Rep. No.94-1476, 94th Cong., 2nd Sess.86 (1976) at 66.

⁸²³ The House of Representatives Report on the 1976 Copyright Bill, House Committee on the Judiciary House Report No.94-1976 to accompany s.22, 94th Congress, 22nd Session (September 1976) 66.

⁸²⁴ *Harper and Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985).

⁸²⁵ 464 US 417 (1984).

time. Certain copyright owners of television programs sued Sony for furnishing the means for copyright infringement. The court held that the Betamax VTR was capable of commercially significant non-infringing uses on the grounds that a substantial majority of VTR use was private in-home copying of free broadcast television for time-shifting purposes.

Next, the extent of fair use was extended by the interpretation in *Harper & Row Publishers, Inc. v. Nation Enterprises*.⁸²⁶ In this case, the Supreme Court interpreted four factors of fair use in terms of making unauthorised use of quotations from an unpublished manuscript. Although the manuscript satisfied the first factor for the purpose of news reporting, it failed to satisfy the other factors, particularly, the commercial nature of the use weighed against a finding of fair use. Moreover, the unpublished nature of the work was weighed heavily against fair use because ‘under ordinary circumstances, the author’s right to control the first public appearance of his un-disseminated expression will outweigh a claim of fair use’.⁸²⁷ On the third factor, despite quoting an insubstantial part of the work of 300 words, it negatively affected the potential market or value of the copyrighted work as the user ‘took what was essentially the heart of the book’.⁸²⁸

Following this, the case *Campbell v. Acuff-Rose Music*⁸²⁹ addressed the application of fair use in terms of parody. In this case, the court emphasised that there were ‘no bright line rules’⁸³⁰ for determining fair use. The first factor – the purpose and character of the use – was carefully evaluated to determine the extent to which the new work was ‘transformative’.⁸³¹ The Court made it clear that ‘the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use’.⁸³² The goal of parody is to comment, at least in part, on the original author’s work, so it is a transformative work. In assessing the third factor of fair use, the court observed that ‘parody’s humour springs from its recognisable allusion to its object, and so it must take

⁸²⁶ 471 US 539 (1985).

⁸²⁷ *Harper and Row Publishers, Inc. v. Nation Enterprises* 471 U.S. 539 (1985) at 555.

⁸²⁸ *Ibid.*

⁸²⁹ 510 U.S. 569 (1994).

⁸³⁰ *Campbell v. Acuff-Rose Music* 510 U.S. 569 (1994).

⁸³¹ The Court defined transformative as ‘adding something new, with a further purpose or different character, altering the first with new expression, meaning or message’. *Campbell v. Acuff-Rose Music* 510 US 569 (1994) at 579.

⁸³² *Campbell v. Acuff-Rose Music* 510 US 569 (1994) at 579; Also see *Cariou v. Prince*, 2013 U.S. App. Lexis 8380 at 23.

enough to conjure up the original'.⁸³³ The fourth factor was concluded to be satisfied because parody is unlikely to harm the market for the original since the two works serve different purposes.⁸³⁴

Fair use is a useful provision in the era of rapid technological change, as it offers a flexible standard for courts to actively adapt the copyright law to major changes in technology.⁸³⁵ As new technologies develop, courts generally have the first opportunity to apply copyright law to them, with Congress lagging behind. With its discretion, the court is able to interpret fairness factors based on their own facts. It has been witnessed by the US that the court enables, among other things, the use of thumbnail images in internet search results,⁸³⁶ caching of web pages by a search engine, a digital plagiarism detection service, and time-shifting of over-the-air broadcasting programming⁸³⁷ by the privilege of the fair use defence in the US. By doing this, a legislative solution of Congress for new technologies is only the final word after the court ruling.

6.5.2.3 Fair use is sufficiently certain and predictable⁸³⁸

Some scholars are concerned about the degree of certainty and predictability of fair use. They have stated that fair use was a 'murky guide',⁸³⁹ or ambiguous, because the interpretation of the doctrine depends on the judge's personal perspective;⁸⁴⁰ for example, how 'the amount used' factor was different between the

⁸³³ *Campbell v. Acuff-Rose Music* 510 US 569 (1994) at 588.

⁸³⁴ *Ibid* 589.

⁸³⁵ The Department of the Attorney General, 'Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the digital age' Issues Paper (May 2005) <<http://www.copyright.org.au/admin/cms-acc1/images/144741021851b6a62aab6b2.pdf>> (retrieved 28th November 2013).

⁸³⁶ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 815-16 (9th Cir. 2003); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163-68 (9th Cir. 2007).

⁸³⁷ *A.V. v. Iparadigms, LLC*, 562 F.3d 630, 637-45 (4th Cir. 2009).

⁸³⁸ ALRC, 'The case of fair use' at 112 <<https://www.alrc.gov.au/publications/copyright-and-digital-economy-dp-79/4-case-fair-use-australia>> (retrieved 12 December 2015).

⁸³⁹ The US Copyright Office asserted in the General Guide to the Copyright Act 1976 that s 107 is somewhat vague, as it would be difficult to prescribe rules to cover all situations. The US Copyright Office and The Library of Congress, 'General Guide to the Copyright Act of 1976' (September 1977) 8:1 <<http://www.copyright.gov/reports/guide-to-copyright.pdf>>. Scholars having the same opinion are Patterson and Lindberg, above note 817 at 198; Patricia Aufderheide and Peter Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (The university of Chicago Press, 2011) 16.

⁸⁴⁰ Martin Brenncke, *Is "fair use" an option for UK copyright legislation?* (Inst. für Wirtschaftsrecht, 2007) 11 available at <<http://www.wirtschaftsrecht.uni-halle.de/sites/default/files/altbestand/Heft71.pdf>> (retrieved 26 November 2013); Keiko Tominaga, 'Does Japanese Copyright Law Need Fair Use?' (2009) 16 (3) *CASRIP Newsletter*

Sony case⁸⁴¹ and the *Harper* case.⁸⁴² In the *Sony* case, the court held that videotaping an entire copyrighted TV program for private later viewing was a fair use,⁸⁴³ whereas in the *Harper* case the court concluded that the use of only 300 verbatim words out of a manuscript containing approximately 200,000 words was not a fair use.⁸⁴⁴ Moreover, in regard to the factor addressing the nature of the use and whether it was for a commercial purpose, the *Harper* case concluded that a users' indirect profit-making motivation was sufficient to prove the commercial nature of the use,⁸⁴⁵ while the *Sony* case said that viewers' direct profit-making motivation was the key factor for drawing the line between the commercial or non-commercial use of the work.⁸⁴⁶

However, recent empirical studies have found that fair use ensures some degree of certainty and predictability. In 2008, Associate Professor Barton Beebe conducted an empirical study on the US's fair use.⁸⁴⁷ He summarised 360 judges' opinions from 215 cases that made substantial use of fair use. He then reported the reversal, dissent, and appeal rates in the fair use case law in order to find out the fair use win rates or how often the courts have found fair use in case law. He found that although the defendant win rate was low,⁸⁴⁸ if the proportion of a judge's opinion devoted to the fair use defence is high [45.5%], it is likely that the opinion ultimately ruled in favour of the defendant.⁸⁴⁹ Moreover, Beebe concluded that leading cases carry prescriptive force to drive later cases, because leading cases represent what most judges who have applied the fair use doctrine have seen fit to do.⁸⁵⁰ Where the non-leading cases declined to follow the leading cases, they 'repeatedly and systematically did so in ways that expanded the scope of the fair use defence'.⁸⁵¹ This means that fair use contains factors of certainty and predictability.

<<http://www.law.washington.edu/Casrip/Newsletter/default.aspx?year=2009&article=newsv16i3JapanFairuse>>

⁸⁴¹ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 USE 417 (1984).

⁸⁴² *Harper and Row Publishers, Inc. v. Nation Enterprises* 471 U.S. 539 (1985).

⁸⁴³ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 USE 417 (1984).

⁸⁴⁴ *Harper and Row Publishers, Inc. v. Nation Enterprises* 471 U.S. 539 (1985).

⁸⁴⁵ *Harper and Row Publishers, Inc. v. Nation Enterprises* 471 U.S. 539 (1985) at 55.

⁸⁴⁶ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 USE 417 (1984) at 450.

⁸⁴⁷ Barton Beebe, 'An empirical study of US Copyright fair use opinions, 1978-2005' (2008) 156 (3) *University of Pennsylvania Law Review* 549.

⁸⁴⁸ A 73% copyright plaintiff trial win rate in federal district courts for the year 1978-200, where only 30.4% of the preliminary injunction opinions found fair use. See Beebe, above note 847 at 579.

⁸⁴⁹ See Beebe, above note 847 at 580-81.

⁸⁵⁰ See Beebe, above note 847 at 662.

⁸⁵¹ *Ibid.*

Next, Professor Pamela Samuelson in her work ‘Unbundling Fair Use’⁸⁵² conducted ‘qualitative assessment’ of the fair use case law. Samuelson asserted that fair use was not as doctrinally incoherent as many have suggested: ‘fair use is both more coherent and more predictable than many commentators have perceived once one recognises that fair use cases tend to fall into common patterns’.⁸⁵³ She said that precedent statistics illustrated that it was possible to predict whether a use was likely to be fair use by analysing previously decided cases in the same policy cluster.⁸⁵⁴

Recently, in 2012, Matthew Sag went further: ‘the predictability of fair use in terms of case facts which exist prior to any judicial determination’.⁸⁵⁵ His study mainly demonstrated the predictability of fair use. He argued that critique of fair use’s certainty is somewhat overblown. The fair use outcomes are probably predictable. The overall predicted probability of a finding in favour of fair use is 38%, but this number increases up to 87% as additional favourable facts are added.⁸⁵⁶ Furthermore, the certainty of the US’s fair use can come from guidelines developed by peak bodies, industry protocols, and internal procedures and documentation.⁸⁵⁷ For example, the 1976 Act Classroom Photocopy Guidelines (1976), guidelines for educational uses of music (1976), and guidelines for off-air recordings of broadcasts for education use (1981) are reprinted in the Copyright Office Circular 21 ‘Reproduction of Copyrighted Works by Educators and Librarians’⁸⁵⁸ provided by the US Copyright Office. There are some other guidelines, namely the Conference on Fair use (CONFU) 1998 guidelines for fair use on three topics: education multimedia,⁸⁵⁹ distance learning,⁸⁶⁰ and digital-images;⁸⁶¹ the Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve use (1982);⁸⁶² and Library and Classroom use of Copyrighted

⁸⁵² Samuelson, above note 472 at 2537.

⁸⁵³ Samuelson, above note 472 at 2541.

⁸⁵⁴ Samuelson, above note 472 at 2542.

⁸⁵⁵ Mathew Sag, ‘Predicting Fair Use’ (2012) 73(1) *Ohio State Law Journal* 47, 51.

⁸⁵⁶ Ibid at 80.

⁸⁵⁷ ALRC, above note 793 at 4.125.

⁸⁵⁸ The US Copyright Office, ‘Circular 21: Reproduction of Copyrighted Works by Educators and Librarians’ available at

<http://zsr.wfu.edu/documents/copyright-circular21_CopyingForEducatorsAndLibraries.pdf>

(retrieved 26th November 2013).

⁸⁵⁹ CONFU, ‘Proposal for Fair Use Guidelines for Educational Multimedia’ (1998)

<<http://copyright.lib.utexas.edu/ccmcguid.html>> (retrieved 27th November 2013).

⁸⁶⁰ Ibid.

⁸⁶¹ Ibid.

⁸⁶² Available at <<http://www.cni.org/docs/infopols/ALA.html>> (retrieved 27 November 2013).

Videotapes and Computer Software (1986).⁸⁶³ Recently, various sectors of users have attempted to create their own guidelines; for example, the Fair Use Checklist of the Columbia University Libraries;⁸⁶⁴ Code of Best Practices in Fair Use for OpenCourseWare;⁸⁶⁵ Using Software: A Guide to the Ethical and Legal use of Software for Members of the Academic Community;⁸⁶⁶ and Fair Use Guidelines for Electronic Reserve Systems.⁸⁶⁷ The above guidelines are setting standards for fair use and developing understanding of fair use practices.

In summary, the four factors of fair use are not tied to a statutory language, so they do not require constant revision in order to keep up with technological changes.⁸⁶⁸ Moreover, judges are able to determine for themselves the existence of additional purposes to which fair use can be applied.⁸⁶⁹ This has been illustrated by judicial practices in the US through experiences with the rapid changes of technologies. Fair use has worked effectively to keep up with new challenges of the digital environment. A number of new limitations and exceptions to copyright, such as format shifting and time-shifting, have been established through judicial practice rather than legislation. This avoids time-consuming searching and adoption of new limitations and exceptions. In doing so, this clears barriers and creates a path for innovation and development. Therefore, there have been many recommendations to adopt fair use to national copyright laws in the digital age, especially in countries using the fair dealing system. In particular, Korea,⁸⁷⁰ Israel,⁸⁷¹ Singapore⁸⁷² and the Philippines⁸⁷³ have already shifted to the fair use approach. Additionally, many

⁸⁶³ Available at <<http://archive.ifla.org/documents/infopol/copyright/ala-1.txt>> (retrieved 27 November 2013).

⁸⁶⁴ Copyright Advisory Office, Columbia University Libraries, 'Fair Use Checklist' <<http://copyright.columbia.edu/copyright/fair-USEe/fair-USEe-checklist/>> (retrieved 16 November 2013).

⁸⁶⁵ Centre for Social Media, School of Communication American University, 'Code of Best Practices in Fair Use for OpenCourseWare' (October 2009) <<http://www.cmsimpact.org/ocw>> (retrieved 26 November 2013).

⁸⁶⁶ Available at <<http://archive.ifla.org/documents/infopol/copyright/educom.txt>> (retrieved 27 November 2013).

⁸⁶⁷ Available at <<http://copyright.lib.utexas.edu/rsrvguid.html>> (retrieved 27 November 2013).

⁸⁶⁸ *Tasini v. New York Times Co.*, 972 F. Supp. 804 (816) (1997).

⁸⁶⁹ AU Copyright Law Review Committee, Simplification of the Copyright Act 1968, para. 6.08; Michael W. Carroll, 'Fixing Fair Use' (2007) 85 *North Carolina Law Review* 98.

⁸⁷⁰ Article 35-3 of the *Copyright Act 1967*.

⁸⁷¹ Section 19 of the *Copyright Act 2007*.

⁸⁷² Section III. 35 of the *Singapore Copyright Act* amended in 2005.

⁸⁷³ Section 185 of the *IP Code of the Philippines*.

submissions to Australia,⁸⁷⁴ Canada,⁸⁷⁵ the UK,⁸⁷⁶ Brazil,⁸⁷⁷ and Chile⁸⁷⁸ have encouraged the government to add open-ended limitations and exceptions similar to fair use to their Copyright Acts.

6.5.3 Fair use or fair dealing for Vietnam?

As was examined in Chapter Two, Vietnam's quality of life is low and the demand for access to knowledge is higher than the rest of the world.⁸⁷⁹ Vietnam has been confronted with a shortage of knowledge for improvement of education, incentive of innovation, improving growth, and enlargement of human enjoyment. Moreover, Vietnam is in a transition stage of development, with a desire for knowledge. As a matter of culture, Vietnam has high demand for knowledge to serve the public's love of learning. Sharing knowledge is favoured in order to facilitate the cultural diversity inherited in Vietnam. As the country is characterised as a net importer of cultural knowledge, it needs a proper mechanism that can reduce the cost

⁸⁷⁴ The Copyright Law Review Committee (CLRC) recommended that the government add a fair use provision into the Australian Copyright Law. See Copyright Law Review Committee, 'Simplification of the Copyright Act 1968, Part 1: Exceptions to Exclusive Rights of Copyright Owners' (AusInfo, Canberra, 1998, 2000, 2012). Similar recommendations were made by the Parliamentary Joint Standing Committee on Treaties Australia-US Free Trade Agreement (JSCOT), the Senate Select Committee on the Free Trade Agreement between Australia and the USE (Senate Select Committee). See at JSCOT Fair use recommendations (23 June 2004)

<<http://www.copyright.org.au/admin/cms-acc1/images/14080026784fbc6ea32c22b.pdf>>; Senate Select Committee Final Report, Recommend 9 (July 2004) <<http://www.copyright.org.au/admin/cms-acc1/images/10895957094fbc6ea5a49b5.pdf>>; the Attorney-General, 'Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exception in the Digital Age Issue Paper' (May 2005)

<<http://www.copyright.org.au/admin/cms-acc1/images/144741021851b6a62aab6b2.pdf>>;

IP Research Institute of Australia (IPRIA) and Centre for Media and Communications Law (CMCL), 'Response to the Issues Paper: Fair Use and Other Copyright Exceptions in the Digital Age' (July 2005)

<http://www.ipria.org/publications/submissions/Fair_use_and_other_copyright_exceptions_in_the_digital_age.pdf> (retrieved 15 December 2013).

⁸⁷⁵ Michael Geist, 'Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use' (2007) 5 *The Copyright Pentology* 157.

⁸⁷⁶ McGlaun, 'UK Copyright Reform Will Significantly Affect Fair Use' (21 December 2012) Daily Tech

<<http://www.dailytech.com/UK+Copyright+Reform+Will+Significantly+Affect+Fair+use/article29478.htm>> (retrieved 26 December 2013).

⁸⁷⁷ Pedro Nicoletti Mizukami et al, 'Exception and Limitations to Copyright in Brazil: A Call for Reform' In Lea Shaver (eds), *Access to Knowledge in Brazil: New Research on IP, Innovation and Development* (Bloomsbury Academic, 2010) 41-74; Eduardo Lycurgo Leite, *The fair use doctrine as a limitation to copyright and a comparative analysis of the three-step test in the copyright systems of Brazil and the US* (SJD Thesis, 2014).

⁸⁷⁸ Daniel Alvarez Valenzuela, 'The Quest for a Normative Balance: The Recent Reforms to Chile's Copyright Law' University of Chile (12 December 2011)

<<http://web.uchile.cl/archivos/derecho/CEDI/Art%EDculos/the-quest-for-a-normative-balance-the-recent-reforms-to-chilee28099s-copyright-law.pdf>> (retrieved 17 November 2014).

⁸⁷⁹ Section 2.3.2 of Chapter Two.

of knowledge. All of these factors reflect that Vietnam requires broad and inexpensive knowledge access for innovation and human development. However, overly strong copyright protection in Vietnam is creating obstacles for innovation and development. It creates a copyright imbalance, increases the price of access and takes away the capability of the public to access cultural knowledge for greater production, and fulfilment of self-education and entertainment. Limitations and exceptions are the other half of the social contract in copyright that can find the balance between the conflicting rights of owners and users. However, this half has been ignored by the law. Current Vietnamese limitations and exceptions are critically strict; therefore, the country needs to extend their scope to rebalance the copyright system and cope with the rapid change in digital technologies and social needs. To achieve this, Vietnam has two options: adopting new a regime of fair use, or remaining under fair dealing. Is fair use or fair dealing more suitable for Vietnam in the digital age?

Fair use seems to be the best option for Vietnam in extending the scope of limitations and exceptions, as it is more flexible, adaptable, and adequately predictable than fair dealing. The above arguments have led to the conclusion that the fair dealing approach is too rigid and restrictive; hence, it will never be comprehensive in its coverage and may prevent digital technology improvement and the dynamism of the information society in Vietnam. Innovation and development in Vietnam may be restrained if the laws remain frozen and outdated, and allow copyright holders to block important new technologies.⁸⁸⁰ Moreover, fair dealing is expected to provide certainty; however, what it has presented in practice shows that fair dealing has not been more certain than fair use. In contrast, fair use is flexible and easily adaptable in the new circumstances that constantly occur in the daily life of the digital economy. It ensures the law avoids instant revisions of inserting new limitations and exceptions into its legislation in order to keep pace with rapid technological changes of the digital age. In terms of certainty or predictability, recent empirical studies⁸⁸¹ have concluded that fair use was actually not incoherent, uncertain, or unpredictable as had been assumed. Statistics from case law showed that fair use outcomes were certain and predictable. In addition, by using the fair use clause, the transaction cost for use of a work may be considerably decreased, as if it

⁸⁸⁰ Matthew Sag, 'Predicting Fair Use' (2012) 73 (1) *Ohio State law Journal* 47, 50.

⁸⁸¹ Beebe, above note 847; Samuelson, above note 472; Sag, above note 880.

is a permitted use under the fair use defence it will gain free access without permission.⁸⁸² Moreover, when the statutory law leaves much to be desired,⁸⁸³ fair use can offer a flexible standard to the courts to fill the gap.

At present, by adopting the fair use defence, time-shifting, format-shifting for private use, parody or satire, and the use of computer software for reverse engineering will be included into the fair use doctrine. In addition, it should be noted that as Abraham Lincoln said, ‘Important principles may and must be flexible’.⁸⁸⁴ Similarly, the Australian Law Reform Committee (ALRC) suggests that ‘a clear principled standard [fair use] is more certain than an unclear complex rule [fair dealing]’.⁸⁸⁵ Life is made up of multiple facets; hence, the law should be flexible to be applicable to many circumstances. No law can be written in a way that embraces and covers all circumstances of reality and society at all times. The legal system is often out of date with real life, because the moment the law is enacted or amended, society has naturally continued to incorporate new facets and aspects. However, if a law is drafted based on a general principle, it can have a wide reach. Modern law is characterised by its generality rather than having a number of factual circumstances as its subject matter. This generality and flexibility allows the law to respond and adapt to new circumstances through its interpretation without requiring legislative interference. The law still remains as written, although its meaning can be adapted to the changes and evolution of society. It contains the capacity to adapt and enhance the law without changing the way it was written. Furthermore, general limitations and exceptions should be described using fair use in order to make them easy to understand. In addition, it is important to note that there are indications that Vietnam tried to shift to fair use in the *Civil Code 1995* by introducing fair use-like provisions

⁸⁸² J R Lunney and S Lynn, ‘Fair Use and Market Failure: Sony Revisited’ (2002) 82 *Boston University Law Review* 975; Wendy J Gordon, *Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives* (Kluwer, 2002).

⁸⁸³ The Vietnamese legal system has maintained various defects. Its law still contains numerous loopholes that contradict each other. See more at Dang The Duc, ‘Overhaul of Intellectual Property System in Vietnam’ *Intellectual Property Magazine* <<http://www.intellectualpropertymagazine.com/ipwo/doc/view.htm?id=49&searchCode=P&channellD=copyright>>; Pham and Associate, ‘Vietnam moves to fill IP System Gaps’ *Modaq* <<http://www.mondaq.com/article.asp?articleid=8872>>; Abbott Philip et al, ‘Trade and Development: Lessons from Vietnam’s Past Trade Agreement’ (2009) 37 (2) *World Development* 342, 346; Global Investment and business Centre USA, *Vietnam Business Law Handbook* (International business Publication, USA, 2007) 24.

⁸⁸⁴ Abraham Lincoln Speech in 1865.

⁸⁸⁵ ALRC, above note 793 at 4.117.

in art 760.⁸⁸⁶ This reflects that Vietnamese copyright law paid attention to fair use and it might be considered as a foundation for the establishment of fair use in this country.

There are some concerns that Vietnam will confront some problems if it introduces the fair use approach; namely, the compatibility of fair use with the Continental law system of Vietnam, the capability of IP judges to deal with factors of fair use in practice, and how legislators manage the fair use rules. Opponents may allude to these issues, but this thesis argues that the fair use approach will work well in Vietnam. First, the legislative tradition of creating laws in Vietnam accounts for every foreseeable circumstance; therefore, the proposal of general fair use may be dismissed by lawmakers. However, when one looks closer into Vietnamese law, open-ended clauses can be commonly found in the *Civil Code 2005*,⁸⁸⁷ the *Constitution*,⁸⁸⁸ and the *Criminal Code*,⁸⁸⁹ among others. Another concern may be raised by scholars and lawmakers: whether fair use is compatible with a civil law country where the law is constructed mainly based on legislation. As has been shown, fair use is a judicial doctrine generated and expanded by courts; hence, it is suitable for common law countries where precedent is one of the most important legal sources. By contrast, civil law countries recognise only legislation. Influenced by French law, legislation is considered the most important legal source in Vietnam.⁸⁹⁰ However, current Vietnamese law partly adopts precedent as one legal source. Article 2 of the *Legislation Act 2008*⁸⁹¹ stipulated that the Vietnamese Supreme People's Court annually provide a legal document to summarise their

⁸⁸⁶ The *Civil Code* 1995 art 760 introduced a general provision for limitations and exceptions to copyright and art 761 provided examples of limitations and exceptions.

⁸⁸⁷ Articles 4-8 of the *Civil Code 2005* incorporates a good faith principle. The *Civil Code* allows the courts to interpret civil transactions based on equality, goodwill, and honesty, even though such terms are not defined under law.

⁸⁸⁸ For example, art 64 of the *Constitution* states that children have an obligation to respect and care for their grandparents and parents. What constitutes the obligations of respect and care is general and depends on case by case interpretation.

⁸⁸⁹ In Vietnamese criminal law, self-defence is the individuals' right to reasonable force to protect him/herself. The self-defence doctrine is a general rule that needs requires clarification by the courts. See more at *Vietnamese Criminal Code 2009*.

⁸⁹⁰ Article 2 of *Legislation Act* No.17/2008/QH12

<http://www.moj.gov.vn/vbpq/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=12817> (In Vietnamese language).

⁸⁹¹ *Legislation Act* No.17/2008/QH12

<http://www.moj.gov.vn/vbpq/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=12817> (In Vietnamese language).

judgements in leading cases in order to instruct lower courts to resolve similar cases in the future. This means that the law allows courts to lay out precedent.

Second, there is a concern about the capability of the court to carry out fair use cases, but this can be feasibly solve.. It is apparent that the fair use doctrine has been successful in the US and Singapore⁸⁹² due to IP judges' knowledge and experience. In Vietnam, copyright law is only a small portion of the law that judges deal with daily. Therefore, most of the lower courts are not very knowledgeable about copyright, are too burdened to learn, tend to rely on faulty precedent, and too often consult only portions of the copyright statute rather than reading it in its entirety.⁸⁹³ Only the Supreme People's Court can be counted on to render copyright decisions that take into account copyright policies and principles, as well as rules, but unfortunately few copyright cases reach the high court.⁸⁹⁴ However, it is possible to overcome this issue. In particular, Vietnam has concentrated on recruiting and training qualified judges. Since 2002, according to the *2002 Law on Organization of the People's Court*, a judge must hold a Bachelor of Law degree, have judicial capacity, and a number of years of legal work experience.⁸⁹⁵ The Vietnamese Supreme People's Court reported that between 2007 and 2012, all judges received Bachelor degrees and the number of judges who had added postgraduate degrees has increased.⁸⁹⁶ Most recently, the *Organisation of People's Court Act* enacted on 11 December 2014 increased judges' knowledge and experience requirements; that is, a

⁸⁹² Recent studies have investigated the contribution of copyright and fair use industries in Singapore since this doctrine was introduced by the Singapore *Copyright Act* in 2005. It was reported that Singapore's fair use amendments have correlated with a 3.33% increase in value added of GDP in 2010. See more at Roya Ghafele and Benjamin Gibert, 'The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair use Policy on Private Copying Technology and Copyright Markets in Singapore' (2012)

<<http://infojUSEtice.org/download/copyright-flexibilities/articles/Roya%20Ghafele%20and%20Benjamin%20Gibert%20-%20The%20Economic%20Value%20of%20Fair%20USEe%20in%20Copyright%20Law.pdf>>

(retrieved 24 March 2015); George Robert Barker, 'Estimating the Economic Effects of Fair Use and Other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore' (2012) Center for Law and Economic, ANU College of Law

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2180769> (retrieved 24 March 2015).

⁸⁹³ WinCo, 'Vietnam to clamp down on copyright infringement' (08 January 2009)

<<http://trangtin.wincolaw.com.vn/TinTuc/NewsDetail.aspx?CategoryID=0&CatalogID=57&NewsID=1585&lang=2>>.

⁸⁹⁴ Ibid.

⁸⁹⁵ *The Law on Organization of People's Court 2002*, art 37.

⁸⁹⁶ Do Thi Thuy Ha, 'Some experience in building up judges' resource in the Supreme People's Court' (2013) The Supreme People's Court (online)

<http://toaan.gov.vn/portal/page/portal/tandtc/Baiviet?p_page_id=1754190&p_cateid=1751909&article_details=1&item_id=29327003> (in Vietnamese language) (retrieved 24 March 2015).

judge needs not only to hold a bachelor degree in law but also to have knowledge and experience in IP, international commerce, and other fields.⁸⁹⁷ The high legal qualification requirements mean that legal knowledge, as well as the competence of Vietnamese judges, will be improved over the short term. Furthermore, training courses in copyright and fair use will help to improve judicial knowledge. Vietnam has received various support from WIPO⁸⁹⁸ and the EU⁸⁹⁹ for educating its judges on copyright. Based on these recent changes, it is hoped that Vietnam will soon have a highly-educated judiciary.

Third there is a concern about, how the courts will react to the patterns and rules of fair use. In US, the fair use doctrine is a legislative codification of numerous cases derived over 150 years.⁹⁰⁰ The rules and patterns have been based on a large number of court decisions. Vietnamese courts have had no experience with any case of fair use, which presents a practical challenge to the judiciary. Therefore, the Vietnamese legislators need to present well-drafted legislation to ensure the doctrine will be as effective in Vietnam as it is in the US and elsewhere. This issue might be overcome by either providing the courts with illustrative examples as guidance or allowing the courts to consider the experience of other court systems such as US.⁹⁰¹

It is important to note that the adoption of the fair use approach will not cause unreasonable harm for copyright owners, because the approach contains criteria that protect the interest of the copyright owner. As discussed earlier in section 6.5.2.1, the four factors of fair use are carefully examined by the US courts to ensure that a use is fair for users and owners. Use of the work result can cause some harm to the copyright owner, but in order to pass the criteria of fair use this harm is likely to be small. For example, in the use of the work for teaching, scholarship and research, it is

⁸⁹⁷ The draft of the *Amendment of the Law on Organization of People's Court 2002*, art 56, released 2014 available at http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_LUAT/View_Detail.aspx?ItemID=749 > (retrieved 22 March 2015).

⁸⁹⁸ WIPO has recently organised regional workshops on IP for judges of Vietnam. See more at WIPO 'Recent Activities of WIPO in the Field of Building Respect for IP' (Geneva, 19-20/2012) <www.wipo.int/edocs/mdocs/enforcement/en/wipo.../wipo_ace_4_2.doc>.

⁸⁹⁹ Currently, the EU, in collaboration with ASEAN are running the EU-ASEAN Project on the Protection of IPRs (ECAP III) to support Vietnam and some other selected countries to upgrade and harmonise their IP system in line with international standards. As a part of the project, there has been assistance to educate judges. See more at ECAP III <<http://www.ecap-project.org/about/ecap-iii-phase-ii>>.

⁹⁰⁰ Hunter, above note 806.

⁹⁰¹ This suggestion is similar to suggestions proposed by ALRC. See ALRC, *Copyright and Digital Economy*, Report No 122 (November 2013) 144-158.

harmful for the copyright owners from the perspective of lost licencing opportunities. However, this loss is typical small because the use of the work in such cases is only using small portions of the work. Also, such uses are justified by the moral obligations of the copyright owners. A copyright work does not come from vacuum; it must lean on existing works. Therefore, the copyright owners may have to sacrifice their own interests for the use of the work as the inspiration of further production. Moreover, the harm suffered by the loss of revenue in the classroom is justified, in the long term, by the advances in education that improve both personal and social outcomes. Similarly, when the use is necessary for the public interest, the interests of copyright owners should be sacrificed. For example, the use of the work for purposes of parody or satire may cause harm, or even undermine the copyrighted work, but such uses are important for citizens to exercise their freedoms of expression as well as to promote cultural diversity.⁹⁰² Therefore, the harms faced by copyright owners are warranted because of the public interest.

It could be argued that a hybrid of the fair use and fair dealing model would be the best option for Vietnam in the transition stage, but this argument has found little support. Such a model has been used in s 200AB of the Australian *Copyright Act 1968*. This involves a mixture of four general factors of fair use combined with specific fair-dealing requirements in certain cases. This combination does not work in practice when it tries to combine flexibility and certainty at the same time. The *Copyright Amendment Act 2006* was inserted into the *Copyright Act 1968* s 200AB⁹⁰³, which is a ‘flexible’ exception to capture some of the benefits of fair use.⁹⁰⁴ The factors that are required to be satisfied are open-ended.⁹⁰⁵ Nevertheless, it contains the close-ended aspect, as only particular user groups, including bodies administering a library or archives, educational institutions, users with a disability

⁹⁰² Ginsburg J C, above note 776.

⁹⁰³ The *Copyright Act 1968*, s 200AB.

⁹⁰⁴ The Attorney-General in the explanatory material accompanying the *Copyright Amendment Bill 2006* stated that s 200AB was intended to ‘provide a flexible exception to enable copyright material to be used for certain socially useful purposes while remaining consistent with Australia’s obligations under international copyright treaties’. This provision was concluded to implement the Trade Agreement between Australia and the US House of Representatives, *Copyright Amendment Bill 2006: Explanatory Memorandum*, (2006) [6.58] available at http://www.austlii.edu.au/au/legis/cth/bill_em/cab2006223/memo_0.html (retrieved 27 December 2013).

⁹⁰⁵ The factors use the same language as the three-step test of *Berne* or *TRIPS*, namely: the circumstances of the use must amount to a special case, the use must not conflict with a normal exploitation of the work or subject matter, the use not unreasonably prejudice the legitimate interests of the owner of the copyright. (*Copyright Act 1968*, s 200AB).

and those assisting such people may take the benefit of the provision. Hence, this provision is called a ‘hybrid’ exception.⁹⁰⁶ The reality shows that Australia failed to add this provision because nominated institutions have mostly chosen to not rely on this exception⁹⁰⁷ due to uncertainties in its application.⁹⁰⁸ This failure is an important lesson for the rollout of such a hybrid model in Australia and elsewhere, and again supports the proposition that fair use is a good candidate for the digital environment. Recently, in its final report on the reform of the *Copyright Act 1968*,⁹⁰⁹ the ALRC once again highly recommended the adoption of the fair use exception.⁹¹⁰

6.6 SUBSTANTIVE LIMITATIONS AND EXCEPTIONS

Fair use or fair dealing do not cover all limitations and exceptions that provide public access to information and knowledge. There are some important limitations and exceptions introduced separately in copyright law including: limitations and exceptions for educational purposes, for libraries or archives, and for people with disabilities. This section looks at substantive limitations and exceptions that provide important privileges for education, libraries or archives, and for disabled people. It shows that those particular limitations and exceptions in Vietnam are typically narrow in scope; therefore, they cannot embrace current circumstances happening in the community. As a result, Vietnam struggles with problems of gaining lawful access, and with issues related to the shortage of educational materials, inefficient public access via libraries, insufficient access to cultural expression by disabled people, and modest access to knowledge for minority ethnic groups.

6.6.1 Limitations and exceptions for educational purposes.

Schools, universities, and other educational institutions play an important public role in disseminating knowledge through educating and training their students

⁹⁰⁶ Hudson, above note 762 at 206.

⁹⁰⁷ In 2013, Emily Hudson conducted an interview of 21 cultural institutions across Australia. The interview indicated that all participating cultural institutions stated that they had not relied on s 200AB at all. See Hudson, above note 762 at 210.

⁹⁰⁸ It is arguable that this provision is too unclear for libraries and archives to use. It only operates in ‘special cases’, which ultimately need to be decided by the courts. To date, there have been no guidelines or case studies about ‘special cases’ as envisaged by s 200AB. This makes the scope of this exception likely to remain uncertain. See Anne Fitzgerald and Kylie Pappalardo, ‘Report to Government 2.0 Taskforce: Copyright and IP’ 53 <<http://eprints.qut.edu.au/29416/>> (retrieved 17 December 2013); Hudson, above note 762 at 222.

⁹⁰⁹ ALRC, ‘Copyright and the Digital Economy’ (Discussion Paper 79, May 2013) <<http://www.alrc.gov.au/publications/copyright-and-digital-economy-dp-79>> (retrieved 13 December 2014).

⁹¹⁰ Ibid, 153.

and conducting research. In doing so, these institutions not only encourage students in critical thinking, create new innovation, enrich cultural knowledge in the community, but also contribute to the wealth of the country. Moreover, education is a fundamental human right: everyone has the right to education and to pursue the aim of education for all is an obligation of each state.⁹¹¹ Okediji recently pointed out that:

Education and basic scientific knowledge are ... important components in creating an environment in which domestic initiatives and development policies can take root. A well-informed, educated and skilled citizenry is indispensable to the development progress.⁹¹²

In addition, education empowers culture. It teaches people how to value culture and is the principal means of transmitting culture from one generation to the next. It is generally accepted that the arts and culture enhance and diversify peoples' overall cognitive and intellectual abilities. Education provides people with added value of life and spirit, which helps to make their use more 'flexible and adaptable to new circumstances'.⁹¹³ In order to fulfil their educative roles, they need to be able to access and use copyright works.

Furthermore, Vietnam urgently requires access to advanced textbooks and educational materials for education in order to resolve the shortage of skilled labour that threaten to spread poverty in urban and rural areas. Currently, the percentage of unskilled labourers has significantly increased. This figure of 66% of the total workforce in 2006 has grown up to over 70% in 2009.⁹¹⁴ According to the World Bank, Vietnam ranks on the bottom half of the rankings for ASEAN labour force development.⁹¹⁵ This stems from the rapid shift of employment out of low

⁹¹¹ Article 26(1), *Universal Declaration of Human Rights*; Koichiro Matsuura, 'Education for All: the Unfulfilled Promise' 21st Century Talks Session on Education for All: Always Tomorrow's Concern?' (2002) <<http://portal.unesco.org/education/en>> (retrieved 12 December 2014).

⁹¹² Okediji, R L, 'The international copyright system: Limitations, Exceptions and Public Interest' Issue Paper No. 15, UNCTAD-ICTSD (2006) 6 <http://unctad.org/en/Docs/iteipc200610_en.pdf> (retrieved 3 October 2014).

⁹¹³ Council of Europe, 'In from the Margins: A Contribution to the Debate on Culture and Development in Europe' European Task Force on Culture and Development (1997) 32 <http://www.coe.int/t/dg4/cultureheritage/culture/resources/Publications/InFromTheMargins_EN.pdf> (retrieved 8 October 2014)

⁹¹⁴ The Strategic Foresight Group, 'Growing Pool of Unskilled Labour Left behind in Vietnam' (2010) <<http://www.searchlightcatalysts.org/node/310>> (retrieved 7 September 2015).

⁹¹⁵ For example, unskilled workers are estimated at 41.4% in Hanoi, 54.5% in Ho Chi Minh city, 62.9% in Vung Tau, and 64% in Haiphong. World Bank, 'Skilling up Vietnam: Preparing the workforce for a modern market economy_ Vietnam Development Report 2014' (November 2013) <www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2013/11/26/000461832_20131126>

productivity agriculture into higher productivity industrial fields in recent years. The rapid economic growth of Vietnam in the last 10 years has been driven predominantly by the huge size of its workforce made up from the youth population, as a large number of unskilled workers have been exploited by other countries for cheap labour. Vietnam has experienced unsustainable economic development⁹¹⁶ because it cannot continue to rely on the size of its workforce for continued success when the ‘golden population’ begins to fade.

Vietnam needs to focus on equipping its workforce with more skill-intensive non-manual jobs in the coming decades. Future growth is highly dependent on a high-quality workforce who is better-skilled and trained in modern education and with better-quality language skills. According to Vietnam Works, a biggest Vietnam-based recruiting company, the number of skilled jobs posting in Vietnam increased by 23% in the first half of 2014 compared to the same period last year; jobs mainly in IT, software and marketing. Unfortunately, many companies have not found it easy to recruit staff due to low supply of necessary skills such as language, cognitive, behavioural and technical skills.⁹¹⁷ Local employees are not up to date with the latest information and technology and lack important knowledge in law and finance. To deal with the skilled worker shortage, many companies in Vietnam have spent a huge amount of money annually retraining their employees.⁹¹⁸ This solution is not effective in the long-term. The solution lies in renovating the higher education system in Vietnam, because a key reason for the lack of skilled workers in Vietnam is the out-dated education system. Although budget allocation has reserved high

[115640/Rendered/PDF/829400AR0P13040Box0379879B00PUBLIC0.pdf world bank vietnam rankings ASEAN labour force development> \(retrieved 07 September 2015\).](#)

⁹¹⁶ Vietnam is in the period of ‘golden population structure’ where for every two people or more working, there is only one dependent person. UNFPA Vietnam, ‘Population and Development’ < <http://vietnam.unfpa.org/public/lang/en/pid/5571> > (retrieved 07 September 2015); Vietnam News, ‘Golden population begins to fade’ (28 May 2014) < <http://vietnamnews.vn/opinion/255446/%E2%80%98golden-population-begins-to-fade.html> > ((retrieved 07 September 2015).

⁹¹⁷ According to recent World Bank Report, less than 15% of the labour force is competent to English and computing skills in Hanoi. World Bank, ‘Skilling up Vietnam: Preparing the workforce for a modern market economy - Vietnam Development Report 2014’ (November 2013) < [⁹¹⁸ According to Nicola Connolly, Vice Chair of the European Chamber of Commerce, foreign companies in Vietnam are forced to spend money for retraining 40-50% of their Vietnamese employees. See at Vietnam Briefing, ‘Foreign Companies Report Labor and Skills Shortage in Vietnam’ \(30 July 2014\) < <http://www.vietnam-briefing.com/news/foreign-companies-report-labor-skills-shortage-vietnam.html> > \(retrieved 18 September 2015\).](http://wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2013/11/26/000461832_20131126115640/Rendered/PDF/829400AR0P13040Box0379879B00PUBLIC0.pdf world bank vietnam rankings ASEAN labour force development> (retrieved 07 September 2015).</p>
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priority to education,⁹¹⁹ knowledge access for education is not noticeable by the Vietnamese government. The state budget has been spent on improving school's infrastructure, school attendance rate, and expansion in the number of universities and colleges, rather than focusing on the quality of education.⁹²⁰ As a result, the quality of education is yet to meet the demand and development of the country. It was reported by VTC News that the majority of textbooks used by Vietnamese universities are imported and translated from Russia, China and East-European since the 1960s and 1970s.⁹²¹ Vietnam urgently needs to cut-off out-of-date curriculum content and improve teaching and learning methods by accessing the latest textbooks and other educational materials in order to help Vietnamese students become more effective problem-solvers, critical thinkers, better communicators, and up-to-date learners.

Educational activities have a strong connection to copyright. Indeed, to catch the student's attention and to improve their learning skills, educators rely heavily on contemporary books, newspapers, magazines, photographs, video, slides, sound recordings, broadcasting programs, and other media.⁹²² In practice, schools make millions of photocopies of copyright material in Vietnam every year. Moreover, the performance of works, the diffusion of radio or television broadcasts, and the communication of video or sound recordings are particularly suitable for teaching in a classroom environment.

It is also necessary to say that promotion of learning and respect of teachers are one of the traditional values of the Vietnamese people.⁹²³ Education has been prioritised in Vietnam for a thousand years, and teachers are highly respected as the

⁹¹⁹ Vietnam is one of the top countries for government spending on education in the world. Within 12 years (from 1998 to 2010), the country increased the total budget for education from 13% to 20%. The state budget for education has been down to 10% from 2013, but investment for education is still a top priority in Vietnam for the purposes of poverty reduction and industrialisation. See World Bank, above note 917.

⁹²⁰ World Bank, 'High quality education for all should be Vietnam's priority' (25 April 2012) <<http://www.worldbank.org/en/news/feature/2012/04/25/high-quality-education-for-all-should-be-vietnams-priority>> (retrieved 10 September 2015).

⁹²¹ Binh Na, 'Textbooks invested millions VND are still outdated' VTC News (03 January 2009) <<http://vtc.vn/dau-tu-tien-ti-giao-trinh-van-lac-hau.2.203143.htm>> (translated from Vietnamese language).

⁹²² Educational Multimedia Fair Use Guidelines Development Committee, Fair Use Guidelines for Educational Multimedia, Washington DC, July 17, 1996, §12.

⁹²³ World Bank, 'Education in Vietnam: development history, challenges and solutions' (2005) <http://siteresources.worldbank.org/EDUCATION/Resources/278200-1121703274255/1439264-1153425508901/Education_Vietnam_Development.pdf>.

‘father’ or ‘the engineers of the human soul’ or ‘being a teacher for one day, being the father for life’.⁹²⁴ In government policy, education has been the prime priority of Vietnam to promote the culture and economic development of the country.⁹²⁵ In short, both the public and the State recognise that education has important social benefits and the relevant uses of copyrighted works should be exempted from the usual legal obligations. In the other words, the use of copyrighted works should be free for education. Provisions of copyright limitations and exceptions for education provide educational institutions with the right to access copyright work ‘without the consent from, and without the payment of remuneration to, the copyright owner’.⁹²⁶

The limitations and exceptions to copyright for education are adopted on the basis of public interest, as well as human rights and cultural factors; therefore, education is necessary for the development of future creators and users of works and inventions.⁹²⁷ The first modern copyright statute in the world, the *Statute of Anne*, said that it was an ‘Act for the Advancement of Learning’⁹²⁸ and it contained provisions to ensure that works are available for education.

Unfortunately, the educational limitations and exceptions are rather unclear, narrow in scope, and lack important provisions. This challenges educators, educational institutions, students, lawyers, and copyright owners in terms of distance learning, copyrightable works in the education sector, the restriction of reproduction, and eligible institutions.

First, the law does not cover limitations and exceptions for self-study circumstances, which impedes students gaining lawful access to cultural

⁹²⁴ The father of Confucianism, Confucius (551-479 BC), was a Chinese philosopher. It is worth noting that Vietnam, throughout history, has been heavily influenced by Chinese culture, particularly in the education sector. In the past, China was the cradle of Eastern Philosophy, especially Confucianism, which was created in China. Vietnam was heavily influenced by this school of thought. Confucianism was used as the main contents of education through Feudal Vietnam until 1945. Despite occupation by the French from 1889, two education systems existed in parallel in Vietnam: one taught Confucianism and the other was taught by the French. To date, Confucian educational philosophy has strongly influenced the educational policies of Vietnam. See more at James A Crites, ‘Confucianism and its spread to Vietnam’

<<http://www.angelfire.com/ca/beekeeper/cf.html>>; Wikipedia, ‘Confucianism’

<<http://en.wikipedia.org/wiki/Confucianism>>.

⁹²⁵ The *Education Law 2005* (amended 2010), Article 9.

⁹²⁶ Article 25(1) (d), (g) and 32 (1) (b) of the *Law on Intellectual Property 2005*.

⁹²⁷ Papadopoulou Maria Daphne, ‘Copyright limitations and exceptions in an E-Education Environment’ (2010) 1 (2) *European Journal of Law and Technology* 3.

⁹²⁸ The *Statute of Anne 1709*, Preamble.

expression.⁹²⁹ The laws only give users the right to make one copy for their own research and teaching without commercial purposes.⁹³⁰ ‘Study’⁹³¹ is not included in the meaning of ‘research’ or ‘teaching’. In the information age, students have a high demand for retrieving information and knowledge for study or greater production. However, they cannot afford to buy copyright works due to their modest budgets. Indeed, the majority of students in Vietnam are photocopying textbooks, articles, and lectures for their study. This has created an industry – the photocopying industry – that produces copies of works to fulfil students’ needs.⁹³² Such acts are obviously prohibited by the law. Therefore, many schools and universities of Vietnam have chosen to rent out places within their campus for the development of photocopying business, rather than provide photocopying services for students, in order to avoid copyright infringement issues. Moreover, some big state university libraries, such as the Vietnam University of Commerce and Hanoi Law University, do not allow students to take educational materials to their premises for the purpose of photocopying, even small parts. The unauthorised reproduction by a student of a reasonable part of a work to illustrate a lesson is accepted in almost all countries in the world.⁹³³ Thus, without the advantage of limitations and exceptions for personal study, students in Vietnam are struggling to gain access to their educational materials lawfully. Vietnam should introduce an exception for self-study. If Vietnam adopts fair use, this use should be included as fair use.

⁹²⁹ Scholars in Vietnam concluded that the *Law on Intellectual Property* does not allow students to reproduce the copyrighted work for self-study purpose. See Ngoc Lam Nguyen, Nam Giang Le, Thi Bich Ngoc Nguyen, ‘Regarding the reproduction right in education environment’ (2007) 2 *Vietnamese Legal Journal* 39.

⁹³⁰ Article 25(1)(a) of the *Law on IP 2005 (amended in 2009)*. The word ‘research’ is defined as ‘scientific research is the activity of discovering and inquiring into phenomena, things and laws of the nature, society and thought, and creating solutions for practical application. Scientific research includes basic research and applied research’ (*The Law on Science and Technology 2000*, art 2(4) available at <http://www.wipo.int/clea/docs_new/pdf/en/vn/vn049en.pdf>). ‘Teaching’ is defined as ‘the imparting of instruction or knowledge; the occupation or function of a teacher’: Oxford English Dictionary online.

<<http://www.oed.com/view/Entry/198356?rskey=gjKT4p&result=1&isAdvanced=false#eid>>.

⁹³¹ The word ‘study’ is defined as ‘the application of mind to the acquisition of learning; mental labour, reading and reflection directed to learning, literary composition, invention, or the like’: Oxford English Dictionary online.

<<http://www.oed.com/view/Entry/192083?rskey=RjTTg5&result=1&isAdvanced=false#eid>>

⁹³² It has been reported by IIPA from 2001 up to now, that Vietnam has suffered from overwhelming piracy, in the form of illegal reprints and photocopies. See more at IIPA 2001-2014 Special 301 Report – Vietnam <<http://www.iipa.com/rbc/2008/2008SPEC301VIETNAM.pdf>>.

⁹³³ This issue is stipulated in §107 of the US legislation as fair use and appears in art 22(1) of the *Chinese Copyright Act*. Similarly, s 40 of the *Australian Copyright Act 1968* considers study as fair dealing.

Second, in the absence of proper remuneration schemes for educational use, it is hard for students and teachers to gain bulk access to educational materials. Like other developing countries, it is a necessity for Vietnam to have access to educational materials at affordable prices. For the purpose of educating skilled people, Vietnam needs to be able to access a complete book or an article. In order to do that, teachers or educational institutions must seek permission from copyright owners, because none of the limitations and exceptions allow them to utilise entire works for teaching.⁹³⁴ Teachers are allowed to make a single copy, while students are not permitted to reproduce works. The administration costs plus royalties for obtaining permission are extremely high, and schools and universities have limited financial resources and weak bargaining power to negotiate with commercial publishers. Therefore, most schools and universities have operated in an isolated world with a modest number of textbooks and little access to scientific journals, especially international journals.⁹³⁵ Students and teachers opt to pay for illegal copies made by photocopying businesses. The photocopying business makes a huge profit from their sale, while publishers and copyright owners suffer from the practice of illegally photocopied works. This leads to two negative outcomes: users in the educational sector incur the risk of being sued at any time by copyright owners, and it erodes the incentive of creativities. This became true in the case of *First New Co. v. Australia International English School & Vietnam Australian English Association* in February 2012.⁹³⁶ The defendants were sued for infringement, as they deliberately reproduced some parts of copyrighted books for their own collections to use in lectures or as study materials in their classrooms. The First New Company required compensation of 390 million VND (approximately USD\$18,000).⁹³⁷ Ultimately, the case was settled by negotiation between the parties: the defendant had to compensate the amount of money for their infringement acts, plus give a public apology.⁹³⁸

⁹³⁴ Article 25 (1)(b), (d) and (g) of the *Law on IP 200 (amended in 2009)* permit to use part-work only.

⁹³⁵ Stephen W Director et al, 'Observes to tertiary education in information technology, electronics-digital and telecommunication fields in some universities of Vietnam' *The National Academies* (August 2006).

⁹³⁶ Cong Quang, 'The first litigation related to books' copyright' *Dantri Online Newspaper* (28/02/2012) <<http://dantri.com.vn/c20/s202-569841/hoi-chuong-thuc-tinh-viec-ton-trong-ban-quyen.htm>> (in Vietnamese language) (retrieved 10 March 2014); Hoa Binh 'Australia International English School and Vietnam Australian English Association were sued' *Baomoi* (online) 22 February 2012 <<http://www.baomoi.com/Anh-ngu-Uc-Chau-va-Anh-van-Viet-Uc-bi-kien/107/7924917.epi>> (in Vietnamese language) (retrieved 10 March 2014).

⁹³⁷ Ibid.

⁹³⁸ Ibid.

The practice of illegally photocopying works in the educational sector has been not tolerated by copyright owners, because it negatively affects the normal exploitations of the work, the second step of the three-step test. This is witnessed by the reaction of the Vietnam Reproduction Rights Organisation (VIETRRO)⁹³⁹ in relation to making copies of artistic works by students and teachers. VIETRRO made a claim to the Ministry of Education and Training (MOET) to ask for compensation (VND10,000 per year per student, or VND500 per teacher for whatever they copied, or asked a photocopying business to pay levies)⁹⁴⁰ for photocopying made by students and teachers. MOET remained silent on this issue. There is a fear that VIETRRO will bring the case to the court for copyright infringement in the educational sector.

Vietnam should learn compulsory licensing schemes from Australia. In Australia, apart from free use exceptions for educational use under the fair dealing doctrine⁹⁴¹ for research or study, and s 200AB,⁹⁴² educational sectors are able to rely on compulsory licensing schemes to obtain access to entire educational materials subject to reasonable payment to copyright owners via the collecting society under pts VA and VB of the *Copyright Act 1968*. Vietnam should introduce compulsory licence schemes in order to allow students, teachers, and educational institutions to reproduce educational materials for a small payment. In addition, the schemes will recoup copyright owners for their efforts via a collecting society such as VIETRRO. This would make both sides happy.

It is important to emphasise that fair use is the uncompensated exception which allows students or teachers to use a reasonable amount of the work, whereas compulsory licences for education are compensated exceptions that provide access to whole copyright works for a reasonable payment. In US, besides fair use, there are a large number of restrictions for educational uses stipulated by s 110(2) of Title 17 of

⁹³⁹ VIETRRO was established on 29 March 2010 by the Vietnam Writer Association and approved by the Ministry of Culture, Sport and Tourism of Vietnam (MOCST) and the Ministry of Home Affairs of Vietnam (MOHA). This organisation is working as a collective management organisation that represents copyright owners to license reproduction rights. Currently, VIETRRO has represented more than 10,000 copyright owners. See more at the VIETRRO website <<http://www.vietrro.org.vn/>> (retrieved 10 March 2014)..

⁹⁴⁰ Baomoi online, 'VIETRRO: will collect 1 million US dollars in 5 years' (21/12/2011) <<http://www.baomoi.com/Hiep-hoi-Quyen-sao-chep-VN-5-nam-thu-phi-sao-chep-1-trieu-usd/594307513.epi>> (retrieved 10 March 2014).

⁹⁴¹ Sections 40-42 and 103A-C, the *Copyright Act 1968* (Cth).

⁹⁴² The *Copyright Act 1968* (Cth).

the US Code.⁹⁴³ Adopting fair use might bring more access for students and teachers to copyright works and allow them to be used effectively. However, it is not a sufficient level of access for educational institutions – they require huge access to textbooks build up modern curriculums, to renovate teaching methods, as well as to provide entire access for research within their institutions. Coming back to the *Dao Thai Ton v. Nguyen Quang Tuan*⁹⁴⁴ case, the litigation would not have happened if the researcher Nguyen Quang Tuan had a right to use entire Dao Thai Ton’s works for research and commentary. This would also be the case in *First New Co. v. Australia International English School & Vietnam Australian English Association*.⁹⁴⁵

In Vietnam, compulsory licences would be a suitable option to allow for the use of entire works for education, because it can ensure the interest of the copyright owner and facilitate the legitimate use of copyright works in educational sectors at the same time. Some people argue it is not necessary to introduce a compulsory licence scheme in Vietnam when educational institutions can go to publishers to negotiate voluntarily. Currently, it is difficult for authors/publishers and the educational sector to reach an agreement in using educational materials, especially in books and textbooks imported from overseas. Authors expect a high rate of royalties, while the educational sector wishes for free access to educational materials. For example, in case of school textbooks, VIETTRO on 24 September 2014 submitted a claim to the Copyright Office of Vietnam to require the amount of VND23,7 billion in royalties – approximately USD\$1 million – for the use of copyright works in school textbooks (from grade 1 to 12).⁹⁴⁶ This is disproportionately high compared to the selling price of school textbooks.

In development policy, Vietnam put priority on education, so the government has tried to ensure every student can afford to buy school textbooks. Hence, school textbooks are sold at under the manufactured price and the government has to cover the publishers’ losses.⁹⁴⁷ Moreover, in Vietnamese culture, free reproduction of

⁹⁴³ Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code < <http://www.copyright.gov/title17/92chap1.html> >.

⁹⁴⁴ Judgement No. 68/2006/DSST.

⁹⁴⁵ Mentioned above at note 935.

⁹⁴⁶ Anh Khoa, ‘Shock with the number of 1 million USD if paid for textbook copyright royalties’ Dantri newspaper (online) (26/9/2014) < <http://dantri.com.vn/giao-duc-khuyen-hoc/choang-voi-con-so-1-trieu-usd-neu-tra-tien-ban-quyen-sach-giao-khoa-1412248941.htm> > (translated from Vietnamese language).

⁹⁴⁷ In Vietnam, publishing school textbooks is not for commercial purpose because publishers suffer loss of income from publishing them. The Vietnamese government has to cover publishers’ losses.

works for education is favoured,⁹⁴⁸ so educational institutions are often not willing to pay royalties for the use of copyright works. Publishers of school textbooks have not paid royalties to the authors of the works for many years. Up to now, licensing fees for using copyright works in school textbooks has not been finalised. In the meantime, copyright owners are losing their licensing fees. Therefore, the voluntary licensing scheme is economically inefficient in Vietnam. It is better that Vietnam sets out a compulsory licencing scheme, in which the government determines a reasonable fixed royalty for the use of the work for education. In doing so, users including teachers, students, and educational institutions will be prepared to pay a small amount of royalties to the copyright owners or a collecting society such as VIETTRO, while the copyright owners are satisfied because their interests are protected. This scheme will bring down licensing prices. At the same time, this forces educational institutions to pay remuneration when using copyright works.

Third, due to the impractical implementation of the *Berne* Appendix,⁹⁴⁹ Vietnam has a shortage of advanced knowledge, as the majority of educational materials distributed in developing countries are reprinted or translated from industrial countries.⁹⁵⁰ As mentioned in Chapter Five, although the *Berne* Appendix provides compulsory licences for reproduction and translation, none of them have been obtained by developing countries due to complicated procedures and time-consuming processes.⁹⁵¹ Therefore, in order to access educational materials, Vietnamese educational institutions need to obtain permission from copyright owners, who are mainly multinational companies in developed countries. As stated by the Head of the Foreign Trade University, the best public university in Vietnam, the University cannot afford textbook prices from developed countries because of its poor budget.⁹⁵² As a result, most textbooks used by tertiary institutions are

See more at Nguyen Minh Thuyet, 'The public will suffer losses because school textbooks' price is increased by copyright royalties' Dantri newspaper (online) (retrieved 4 October 2014) <<http://dantri.com.vn/giao-duc-khuyen-hoc/cong-chung-se-thiet-neu-sach-giao-khoa-bi-doi-gia-vi-tac-quyen-1412965281.htm>> (translated from Vietnamese language) .

⁹⁴⁸ See Chapter Two.

⁹⁴⁹ The compulsory licencing schemes provided by the Appendix of *Berne* were identified as impractical in Section 5.4.3 of Chapter Five.

⁹⁵⁰ UNESCO, *Basic Learning Material Initiative*, Chapter 5 <http://www.unesco.org/education/blm/chap5_en.php>.

⁹⁵¹ See Section 5.4.3 of Chapter Five.

⁹⁵² Ngan Anh, 'Why have Vietnam universities not wanted to import text books abroad?' Vietnamnet (online) 21 December 2014 <<http://vietnamnet.vn/vn/giao-duc/212162/tai-sao-truong-dai-hoc-khong-hao-hung-nhap-khau-giao-trinh-.html>> (in Vietnamese language) (retrieved 10 March 2015).

obsolete.⁹⁵³ The country misses the opportunity to educate skilled people to absorb new technologies, generate innovation, and compete in the global knowledge economy.

Vietnam cannot solve this problem alone. It needs to collaborate with other developing countries such as Brazil or Chile to put pressure on the international community. Brazil is leading a movement within WIPO to take into account constructing limitations and exceptions to copyright for innovation and development. This country actively asked WIPO for new agreements for the benefit of the developing world. For example, Brazil has, along with other countries in the group of ‘Friends of Development’,⁹⁵⁴ submitted a Proposal for a Development Agenda in 2004. The Development Agenda was then adopted by the General Assembly of WIPO in September 2007, including 45 recommendations towards development-oriented approaches to IP that would allow equal access to copyright works.⁹⁵⁵ In 2005, Brazil made a proposal calling for a general public interest clause, broad copyright limitations and exceptions, and a minimum list of exceptions to be present in a future treaty.⁹⁵⁶ Chile, in November 2004, for instance, asked WIPO to include limitations and exceptions to copyright for the purposes of education, libraries and archives, and disabled persons on the WIPO’s Standing Committee on Copyright and Related Rights in order ‘to strengthen international understanding of the need to have adequate limitations, learn from existing models, and move towards agreement on exceptions and limitations for public interest purposes, which, like minimum standards, were to be envisaged in all legislation for the benefit of the international community’.⁹⁵⁷ Following this, in 2005, Chile composed another proposal concerning the protection of broadcasting organisations⁹⁵⁸ that recommended some

⁹⁵³ A number of textbooks used in Vietnam today were translated from Russian textbooks that were published in the 1980s. See more at Ngan Anh, Ibid.

⁹⁵⁴ The ‘Friends of Development’ group includes Brazil, Argentina, Bolivia, Cuba, the Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania, and Venezuela.

⁹⁵⁵ WIPO General Assembly, Thirty-Fourth (18th Ordinary) Session, Geneva, September 24 to 3 October 2005, Report, WIPO, Document no. WO/GA/32/13 (12 November 2015).

⁹⁵⁶ WIPO, *Proposal by Brazil on the Protection of Broadcasting Organization – Corrigendum* (21 November 2005) SCCR/13/3 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=53241>.

⁹⁵⁷ WIPO, *Proposal by Chile on the subject “Exceptions and Limitations to Copyright and Related Rights” (Chile’s 2005 submission)* (17-19 November 2004) SCCR/12/3 <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_12/sccr_12_3.pdf>.

⁹⁵⁸ WIPO, *Proposal by Chile concerning the treaty for the protection of broadcasting organisation* (21-23 November 2005) SCCR/13/4 <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_13/sccr_13_4.pdf>.

exceptions to copyright in the case of broadcast.⁹⁵⁹ A few days later, Chile submitted another Proposal on the Analysis of Exceptions and Limitations that requires the recognition of minimum limitations and exceptions at the international level.⁹⁶⁰ Next, Chile, along with Brazil and others, proposed a Proposal to Standing Committee on Copyright and Limited Rights for Limitations and Exceptions in 2008.⁹⁶¹ Currently, Chile, along with Vietnam and other developing countries, is negotiating with developed countries, including Australia and the US, on the Agreement of Trans-Pacific Partnership (TPP). This Agreement contains provisions of copyright limitations and exceptions. Chile is actively protesting provisions that create more restrictive limitations and exceptions. Vietnam should join the active developing countries' group of Chile, Malaysia, Brunei, and others to raise its voice in international discussions in order to obtain practical limitations and exceptions for the interest of developing countries.

Fourth, current limitations and exceptions for education do not extend to distance learning, which constrains the development of this educational model. Recently, distance learning⁹⁶² has played an important role, due to the massive demand from not only remote areas, but also big cities such as Hanoi and Ho Chi Minh. The emergence of information technology, especially the internet, has made distance education flourish⁹⁶³ and become a great monetary potential for educational institutions and enterprises.⁹⁶⁴ At the same time, distance learning brings equality for

⁹⁵⁹ Ibid, section III.

⁹⁶⁰ WIPO, *Proposal by Chile on the Analysis of Exceptions and Limitations* (22 November 2005) SCCR 13/5 <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_13/sccr_13_5.pdf>.

⁹⁶¹ WIPO, *Proposal by Brazil, Chile, Nicaragua and Uruguay for Work Related limitations and exceptions* (17 July 2008) SCCR/16 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=10771>.

⁹⁶² Distance learning is defined as 'a form of education in which students are separated from their instructors by time and/or space'. See US Copyright Office, 'Report on Copyright and Digital Distance Education' (5/1999) ii <http://www.copyright.gov/reports/de_rprt.pdf>.

⁹⁶³ It was recorded in 1998-1999 that approximately 800,000 learners participated in courses of distance education. Global Distance Learning Network, 'A Country Report on Open and Distance Learning in Vietnam' (2001) http://gdenet.idln.or.id/country/ar_vietnam/CRVietnam.htm; Doung et al, 'Distance education policy and public awareness in Cambodia, Laos and Vietnam' Distance Education 28 (2007) 2, 163-177 <<http://search.proquest.com/docview/217779057?accountid=13380>>.

⁹⁶⁴ Distance learning has been undertaken in Vietnam since 1993, when the government created two Open Universities to help the development of distance education in Hanoi and Ho Chi Minh cities. Distance learning is reaching wider audiences, covering all segments of the population. The college audience is increasing rapidly due to responsiveness to the needs of an older, non-traditional student population. Students also include professionals engaging in professional development or training, and retirees. To date, 17 universities have provided distance learning programmes and covered 63 cities and provinces in Vietnam. Approximately 160,000 students have graduated and around 233,000 students are studying such programmes. Distance education in Vietnam is the most utilised form of higher education. Before the spread of the internet, distance learning was conducted via audio or

people in education, regardless of their locations and conditions,⁹⁶⁵ which is good for human development. Therefore, it needs to be facilitated in Vietnam. Unfortunately, this educational model is impeded by inappropriate limitations and exceptions because Vietnamese limitations and exceptions treat distance learning as the same as face-to-face learning. Today's distance education courses use digital technologies such as email, shared applications, streaming video/audio, video/audio file sharing, links, interactive CD-ROMs and DVD-ROMs⁹⁶⁶ for various purposes and in numerous ways. These uses during the conduct of distance education make it different from face-to-face instruction. In virtual life, a teacher using a work to teach her class will invariably exercise one or more of the copyright owner's exclusive rights. She reproduces it and displays it to her limited students. In this situation, the one-copy reproduction rule⁹⁶⁷ can be workable. Unlike face-to face teaching, if a teacher wants to display a copyrighted work to students she/he must transmit it over a digital network. The transmission over a digital network will generally constitute an exercise of the reproduction right and possibly the distribution right.⁹⁶⁸ The digital transmission involves the automatic creation of copies during the transmission process. Particularly, when material is transmitted to a distant location over a computer network, temporary RAM copies are made in the computers through which it passes, by virtue of the technological process of transmission. In the other words, RAM copies implicate the copyright owner's reproduction right.⁹⁶⁹ The copy of the work that arrives on the recipient's computer is the ultimate copy in this process. This means that it is possible to create numerous copies of the work using digital transmission. This kind of digital transmission constitutes the communication right to the public via a computer network. Therefore, it does not enable educators to digitise

visual audio broadcasts, tapes, CDs, VCDs. Thanks to the development of the internet, educational materials are now digitalised and transmitted to learners via the internet. See more at Vi Thuy, 'Develop distance learning – an indispensable trend' *Education and Epoch online Newspaper* (2/11/2009) <<http://www.gdtd.vn/channel/2741/200911/Phat-trien-giao-duc-tu-xa-Xu-the-tat-yeu-cua-thoi-dai-1913519/>>.

⁹⁶⁵ Distance education helps students overcome such barriers as full-time work commitments, geographic inaccessibility, and the difficulty of obtaining child or elder care, and physical disabilities. It can also provide the advantage of convenience and flexibility. Digital technologies enable courses to reach and appeal to wider audiences, including rural, busy, impaired, and retired people.

⁹⁶⁶ See more detail about these technologies at US Copyright Office, 'Report on Copyright and Digital Distance Education' (5/1999) 20 <http://www.copyright.gov/reports/de_rp.pdf>.

⁹⁶⁷ This is the rule established in arts 25(1)(a) and 32 (1)(b) of the *Law on Intellectual Property 2005* that allows users to reproduce only one copy of a work for teaching purposes.

⁹⁶⁸ The US Copyright Office, 'Report on Copyright and Digital Distance Education' (5/1999) 20 <http://www.copyright.gov/reports/de_rp.pdf>.

⁹⁶⁹ *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F. 2d 511 (9th Cir.1993); *Stenograph L.L.C. v. Bossard Assocs.* 144 F. 3d 96, 101-02 (D. C. Cir. 1998).

and transmit copyright materials to remote students, as this processes definitely creates multiple copies instead of one copy. This shortcoming needs to be fixed as soon as possible.

Fifth, the one-copy reproduction rule for reproduction of educational materials for teaching⁹⁷⁰ stands as an obstacle to the educational sector. It challenges teachers in the course of distributing the work to students. How can she/he do this with only one copy in her/his hand? She can perhaps pass it to the students and the students can enjoy the copyrighted work for a short period and return it to the teacher. Even this can be seen as a copyright infringement, as Vietnamese limitations and exceptions do not mention that teachers are entitled to distribute the work to a class. In reality, teachers often make multiple copies of essential materials and distribute them to their students. More professionally and conveniently, educational institutions combine necessary materials together and make copies to deliver to their students so that they can be used in classrooms. Such acts by teachers or educational institutions are absolutely liable for copyright infringement. It is evident by the litigation between *Fist New Co. v. Australia International English School & Vietnam Australian English Association* in February 2012.⁹⁷¹ In this case, the defendants paid a huge amount of compensation for the use of the compilations that contained some parts of the plaintiff's books in their classrooms, because they infringed copyright by making more than one copy of some excerpts of copyrighted works and distributing them in their classrooms. This discourages schools from endeavouring to make study material resources and impedes the overhaul of education. Therefore, Vietnam should remove the one-copy rule from its limitations and exceptions.

Last but not least, access to educational materials of minority ethnic groups is restricted because copyright law removed the limitations and exceptions for translation of works from Vietnamese language to minority languages. Vietnam is a culturally diverse country, with 54 different ethnic groups and 90 different languages. Although King people (or Viets) account for approximately 86% of

⁹⁷⁰ The *Law on IP 2005 (revised 2009)*, art 25(1) (a). This provision was interpreted by the Decree 100/2006/ND-CP that no more than one copy of a work is allowable. See more at the Appendix of this thesis.

⁹⁷¹ Cong Quang, 'The first litigation related to books' copyright' *DantriOnline Newspaper* (28/02/2012) <<http://dantri.com.vn/c20/s202-569841/hoi-chuong-thuc-tinh-viec-ton-trong-ban-quyen.htm>>.

Vietnam's total population,⁹⁷² the *Vietnamese Constitution* explicitly declares that 'every nationality group lives equally, co-operates, and helps each other. Each ethnic group has the right to preserve and use their own language'.⁹⁷³ Currently, many ethnic groups – such as Tay, Thai, Muong, H'Mong, Dao, and Khmer – use their own languages in conjunction with the national Vietnamese language. It is worth noting that members of 53 ethnic minority groups in Vietnam occupy up to 14% of the country's population, but they account for more than half of the country's poor people. The Vietnamese government has contributed to exercising favourable policies to such groups. One such effort is to provide education and give opportunities to absorb cultural and artistic activities from outside these ethnic communities.⁹⁷⁴ Unfortunately, the privilege of translation and distribution of works from Vietnamese languages to minority ethnic languages that used to exist under art 761(f) of the *Civil Code 1995* was removed by the *Law on IP 2005 (amended in 2009)*. Therefore, these translations and distributions infringe copyright if they are done without authorisation and payment of royalties. This results in a shortage of textbooks, newspapers, and books translated from the national Vietnamese language into ethnic languages.⁹⁷⁵ It explains why numerous people of minority ethnic groups are living in poverty and are uneducated. Therefore, Vietnam should add limitations and exceptions for translation and distribution of works to minority ethnic languages for educational purposes.

It is important to stress out that adding new provisions on limitations and exceptions to copyright for the purpose of education do not unreasonably prejudice the interests of copyright owner. In particular, amending errors existing in the current law in regard to limitations and exceptions for education – namely, adding an exception for self-study and removing the one-copy reproduction rule in reproducing educational materials for teaching – is not 'unreasonable prejudice' to the copyright owner. It is assumed that some prejudice must arise to the author; however the use

⁹⁷² Cu Hoa Van, 'The nationality issue and the implementation of nationality policy in Vietnam: Facts and solutions' National Assembly of Vietnam (2009)

<http://www.na.gov.vn/sach_qh/chinhhsachpl/phan4/p4_iv_6.html>; Indexmundi, 'Vietnam Demographic 2012' <http://www.indexmundi.com/vietnam/demographics_profile.html>.

⁹⁷³ Article 34 of *Constitution 1992* of Vietnam.

⁹⁷⁴ Bert Maetern, 'Challenges of Poverty's Reduction in Vietnam' Oxfam in Vietnam (05/03/2012) <<http://oxfaminvietnam.wordpress.com/2012/03/05/the-challenges-of-poverty-reduction-in-vietnam/>>.

⁹⁷⁵ Thong Ta Van 'Preservation languages of minority ethnic group in Vietnam' *The People* (online) 12 July 2014 <<http://www.nhandan.com.vn/khoahoc/khoa-hoc/item/23754202-bao-ton-ngon-ngu-cac-dan-toc-thieu-so-o-viet-nam.html>>.

for the purpose of ‘study’ does not impose a disproportionate prejudice to the economic and personal interests of the copyright owner. First, according to Sam Ricketson, the use of the work in terms of ‘study’ does not compete commercially with the copyright owner.⁹⁷⁶ Second, the use of a small amount of the work causes some losses for copyright owners but can be justified for the benefits of the public. As indicated by Ricketson in the interpretation of the three-step test of the *Berne Convention*, the ‘not unreasonably prejudice’ phrase in the third step of the *Berne Convention* allow the making of exceptions that cause prejudice of a significant or substantial kind to the author’s legitimate interests as long as ‘it is proportionate or within the limits of reason – that is, if it is not unreasonable’.⁹⁷⁷ Ricketson said that ‘the requirement of proportionality clearly implied that there may be conditions placed on the usage that will make any prejudice that is caused ‘reasonable’, for example...the usage should be subject to certain conditions or within certain guidelines’.⁹⁷⁸ Similarly, in the preparatory work for the Stockholm Revision Conference 1967, the discussions of Main Committee I provided an example given by Professor Ulmer that:

A rather large number of copies for use in industrial undertakings...may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying maybe permitted without payment, particularly for individual or scientific use.⁹⁷⁹

Therefore, the use for ‘study’, subject to conditions placed on the usage, causes prejudice for the copyright owner, but ‘unreasonable prejudice to the interests of the copyright owner’ is voided by the imposition of the conditions on the usage, which is the use for public good. This use can help to improve skills and knowledge of the Vietnamese people. When teachers or educational institutions use entire works, they are required to pay an equitable remuneration by a set royalty under a compulsory licence. By the interpretation of Main Committee I quoted above,⁹⁸⁰ it is deemed to not unreasonably prejudice the interests of copyright owner, because a requirement to pay remuneration under compulsory licence can recover the losses of the copyright owner. Also, it is a technical mistake of legislation to fail to include the

⁹⁷⁶ Sam Ricketson, *The three-step test, deemed quantities, libraries and closed exceptions* (The Centre for Copyright Studies Ltd, 2002) 63.

⁹⁷⁷ Ricketson, *Ibid* at 40.

⁹⁷⁸ *Ibid*.

⁹⁷⁹ *Records 1967*, Vol II, pp 1145-1146. Professor Ulmer’s comments appear at p.883.

⁹⁸⁰ *Ibid*.

term of ‘study’ in art 25(1)(1) of the *Law on IP 2005 (revised in 2009)*. This error may be blamed on the fact that legislators understood the term of ‘teaching’ to include ‘study’ activities.⁹⁸¹ Therefore, adding this term does not negatively impact any interest of the copyright owner; it simply fixes the technical mistake which existed in the law.

Likewise, removing the one-copy reproduction rule in reproducing educational materials for teaching will ensure the law works with the practice of society. If teachers are allowed to extract reasonable amounts of the copyright work, they then should be allowed to reproduce more than one copy because they often have more than one student in the class – they cannot ask all their students to share only one copy. The copyright owners have not lost more if some reasonable parts of their works are reproduced in multiple copies in classrooms, because a teacher who is allowed to distribute some reasonable parts of the works in the classroom will not pay anything for the use, regardless of whether one copy or multiple copies are used. If she is allowed to distribute only one copy, she will spend more time waiting for the copy to pass through all the students, which is impractical in real life. In fact, teachers are currently choosing not to obey the law. They are distributing multiple copies in their classroom without paying anything. Also, the copyright owner cannot detect how many copies a teacher uses in the classroom, so he/she cannot ask the teacher to pay for distributing more than one copy. Overall, the copyright owners earn nothing from the one-copy rule in term of distributing a work in classrooms.

Similarly, extending limitations and exceptions for education from face-to-face to distance learning will bring the law up to speed with current practice. Educational materials transmitted to students in the course of distance learning are either legal copies under permission of copyright owner or under limitations and exceptions to copyright. The materials are sent to specific students counted by educational institutions, not to the public. This is not much different from handing hardcopies over students in classrooms. In doing this, the interests of the copyright owners are prejudiced, but their harm is warranted or recovered by royalties. If educational institutions transmit a small amount of the work under fair dealing provisions, such use is fair and cause minimal harm to the copyright owners. If institutions transmit

⁹⁸¹ ‘Teaching’ under Vietnamese language sometimes includes two activities: ‘teaching’ and ‘studying’. See at ‘Giang day’, Vietnamese language, Vietnamese dictionary at Tu dien tieng Viet < <http://www.informatik.uni-leipzig.de/~duc/Dict/>>.

whole works under licencing schemes, they have to pay royalties to the copyright owners. Moreover, the suggestion of introducing compulsory licencing for education is not only to provide the opportunity for students/teachers to legally obtain bulk access to copyright works, but also to create more money for the copyright owner by collecting royalties via collecting societies. Therefore, providing more access for education purposes can help Vietnamese the people improve their skills, knowledge and enjoyment, and do not harm the interest of the copyright owner. New reforms done in this way will keep the balance between interests of copyright owners and users.

6.6.2 Limitations and exceptions for libraries and archives

Libraries play an important role in society. They contribute greatly to promoting learning, and spreading and sharing knowledge among members of society in furtherance of a common good.⁹⁸² They are the public's access points to knowledge. Patrons can rely on their resources to accomplish research, teaching and learning, or even creating new works. More importantly, these access points are free of charge;⁹⁸³ they have immense value for the people who lack resources elsewhere, like so many in Vietnam.

In exercising their function, libraries become deeply involved in access to cultural works when they make reproductions of the works for purposes of preservation, distribute the works for research, private study, and teaching, and send or receive works under the name of interlibrary loans. Indeed, typical functions of libraries have been defined over the years: collection, preservation, archiving, and dissemination of information to the public.⁹⁸⁴ The preservation and archiving of copyrighted works often involves making reproductions from original works. The dissemination of information takes place in a number ways: either by lending copies of works, by permitting the public consultation of works on the premises of the library or the consultation of electronic works at a distance, by allowing patrons to

⁹⁸² Guan H Tang, 'Public libraries, copyright and the public interest: In *Copyright and the Public Interest in China* (Edward Elgar, 2011) 167; Juan Carlos Fernandez-Molina and Jose Augusto Chaves Guimaraes 'Library exceptions in the copyright laws of Ibero-American countries' (2010) 26 (3) *Information Development* 214, 215; Shalini R Urs, 'Copyright, academic research and libraries: balancing the rights of stakeholders in the digital age' (2004) 38(3) *Program: Electronic Library and Information System* 201, 201.

⁹⁸³ See *Ordinance of Libraries 2001* of Vietnam, art 6(2).

⁹⁸⁴ *Ordinance of Library 2001*, art 1 <<http://nlv.gov.vn/nlv/index.php/2008060476/Van-ban-Phap-quy-chung/Phap-lenh-thu-vien.html>>.

make their own reproductions of works for personal purposes using accessible machines (photocopy, microfiches, scanner or printer), or by transmitting works at the request of individual patrons in the context of a document delivery service or an interlibrary loan service.⁹⁸⁵

Vietnam copyright law provides privileges for libraries to access cultural expression; however, this privilege is extremely limited, therefore libraries are struggling to provide adequate resources, to create friendly, accessible environments, as well as extending their service to different groups of the community. First, there is the fact that collections of Vietnamese libraries are modest and insufficient to meet the demands of the public. There are many reasons for this, such as the lack of funding to import collections from overseas, the development of collections mainly depending on donations, the limited number of works published in Vietnamese, or untrained libraries in archiving works.⁹⁸⁶ The restricted scope of limitations and exceptions for libraries partly contributes to this issue. Libraries are permitted to reproduce cultural works for preservation under art 25(1)(d) of the *Law on IP 2005 (amended in 2009)*.⁹⁸⁷ However, only one copy can be made.⁹⁸⁸ This rule challenges librarians, because original works, especially printed works, have been damaged, lost, or stolen. If this happens, and there is only one copy left, this copy will be at risk of being damaged, lost or stolen. However, librarians are not allowed to make multiple copies or digitalise them for safe preservation. Therefore, they are suffering the loss of cultural works from the libraries' collections. This means cultural heritages might be eroded. This negatively impacts on human development, as it shrinks the range of cultural works that human beings can learn from and enjoy. In Australia⁹⁸⁹ and the US⁹⁹⁰ libraries and archives are allowed to digitalise or make three preservation copies of works for preservation and replacement. In Chile,

⁹⁸⁵ Guibault, above note 460 at 12.

⁹⁸⁶ See more at Barbro Thomas, 'Development of Public Library Performance in Laos and Vietnam' National Library of Sweden, Final Report (March 2009) 13
<http://www.kb.se/Dokument/Bibliotek/utredn_rapporter/2009/Laos_Vietnam_Final_Report_2009-04-07.pdf> (retrieved 14 March 2015).

⁹⁸⁷ Article 25(1)(d) of the *Law on IP 2005*.

⁹⁸⁸ Article 25(2) of the *Decree 100/2006/ND-CP (21/9/2006) detailing and guiding the implementation of a number of articles of the Civil Code and the Intellectual Property regarding the copyright and related right*.

⁹⁸⁹ Sections 51A, 110B, 110BA of the *Copyright Act 1968 (Cth)*.

⁹⁹⁰ Sections 108 (b), (c) of the *US Copyright Act*.

libraries and archives can reproduce unlimited copies of works for preservation and replacement.⁹⁹¹

Moreover, libraries are confronting difficulties in exercising their function of dissemination of knowledge to the public, as ‘libraries are not allowed to reproduce and disseminate copies of works to the public, even digital copies’.⁹⁹² Article 25(1)(d) of the *Law on IP 2005 (amended in 2009)* refers to the right of libraries to reproduce one copy for research. In connection to the provision that prohibits libraries from reproducing and disseminating copies of works to the public, it is likely that the libraries are only entitled to copy one copy for themselves to serve their own research, not for research purpose of the public. This means that libraries are not allowed to reproduce and supply copies of articles or books to their patrons, which is the public, as well as to other libraries through interlibrary systems. Prohibiting the supply of copies of works to patrons creates obstacles to the dissemination of knowledge, as libraries can only provide materials to be enjoyed on their premises, without allowing any copying of materials. Currently, if the patrons want to make a copy for the legitimate purposes of research or teaching, they must borrow copyrighted works and take them somewhere else to reproduce them, rather than order library officers to do so. This not only creates huge profits for the photocopying industry, but also makes libraries less helpful and discourages patrons from retrieving resources from libraries. This explains why Vietnam’s citizens have a longstanding passion for reading;⁹⁹³ public libraries are widespread throughout the country,⁹⁹⁴ but only a small portion of the population take advantage of public libraries.⁹⁹⁵ Vietnamese libraries tend to focus on their archiving function rather than reaching out the community.⁹⁹⁶ Even serving a small part of the population, Vietnamese librarians are less responsive, less helpful, and offer a poor service to the

⁹⁹¹ Article 71 I of the *2010 Chilean IP Law*.

⁹⁹² Article 25(2) of the *Decree 100/2006/ND-CP* (21/9/2006) detailing and guiding the implementation of a number of articles of the *Civil Code* and Intellectual Property regarding the copyright and related rights.

⁹⁹³ Over 90% of the Vietnamese population are literate. Every corner of streets or parks shows people reading books, newspapers, or magazines. In addition, over 25 million people access websites via the internet daily for the love of reading. See Dinh Kieu Nhung, ‘Unlocking the Potential of Vietnam’s Libraries’ *The Asia Foundation* (online) 7 September 2011 <<http://asiafoundation.org/in-asia/2011/09/07/unlocking-the-potential-of-vietnams-libraries/>> (retrieved 14 March 2015).

⁹⁹⁴ There are nearly 2,000 commune-level libraries, 613 district libraries, 63 provincial libraries and a national library. See Dinh Kieu Nhung, *Ibid*.

⁹⁹⁵ Recent surveys indicated that only 2 or 3 % of the population have used a library’s services. This figure is around 60% of the population in the rest of the world. Barbro Thomas, above note 986 at 17.

⁹⁹⁶ Thomas, above note 986 at 17.

community.⁹⁹⁷ As said by Barbro Thomas, ‘public libraries in Vietnam are low quality and do not meet the demands of the public’.⁹⁹⁸ It is necessary to note that the majority of WIPO’s member states permit reproducing by libraries for patron use, if such use is for the purpose of private research, study, or scholarship.⁹⁹⁹ Ninety-three of 186 of WIPO country’s members allow librarians to provide copies for research or study.¹⁰⁰⁰ Therefore, it is a necessity that Vietnam removes access barriers by allowing libraries to reproduce and distributes copies of works to users. Doing so will not only make libraries more helpful, but also provide Vietnamese citizens with more access.

Furthermore, the development of interlibrary lending in Vietnam is impeded because copyright law does not allow libraries to reproduce works to the public. Within academic libraries, interlibrary loans have been seen as the effective way of supplementing the limited resources currently available. This becomes more important in Vietnam, as most libraries do not have sufficient resources to meet their own needs. Interlibrary lending originated in 260-240 BC,¹⁰⁰¹ flourished in 1970,¹⁰⁰² and become an explicit and realistic trend in developed countries such as the US, UK, Japan, and Australia.¹⁰⁰³ In Vietnam, the collaboration between libraries is weak, and interlibrary lending is currently only a prospect.¹⁰⁰⁴ However, this prospect might never become true as interlibrary lending is considered an act of making works available to the public, which is not allowed under present copyright law.¹⁰⁰⁵ In WIPO’s study on limitations and exceptions for libraries or archives in

⁹⁹⁷ Nhung, above note 993; Thomas, above note 986 at 17.

⁹⁹⁸ Thomas, above note 986 at 6.

⁹⁹⁹ See more at WIPO’s study on copyright limitations and exceptions; Crews, above note 401 .

¹⁰⁰⁰ Crews, above note 401 at 6.

¹⁰⁰¹ It was when Callimachus was a librarian of the library of Alexandria. See more at H W Winger ‘Aspect of Librarianship: A Trace Work of History’ (1961) 31 (4) *The Library Quarterly*, 321, 330.

¹⁰⁰² D Keast, ‘Gratis: the co-operative solution to inter-library loans’ (1985) 34 (3) *Australian Library Journal* 35, 37.

¹⁰⁰³ C Mak, ‘Resource sharing among ARL libraries in the US: 35 years of growth’ (2011) 39 (1) *Interlending and Document Supply* 26-31; R Missingham, and M Moreno, ‘Resource sharing in Australia: evaluation of national initiatives and recent developments’ (2005) 33 (1) *Interlending and Document Supply* 26-34.

¹⁰⁰⁴ National Library of Vietnam, Improving the collaboration between libraries and informational institutes in Vietnam (03/06/2008) <<http://nlv.gov.vn/nlv/index.php/2008060356/Nghiep-vu-chung/Tang-cuong-phoi-hop-hoat-dong-giua-cac-co-quan-TT-TV.html>>; Tom Denison and Michael Robinson, ‘Breaking ground: library system implementation in Vietnam’ Library and Learning Resource Centre Projects, RMIT Vietnam (2004) <<http://www.vala.org.au/vala2004/2004pdfs/38DenRob.PDF>>.

¹⁰⁰⁵ WIPO’s Member States, except Sweden, believe that the production and/or distribution of copyrighted works for the purpose of interlibrary lending constitutes dissemination to the public. See

2014, nine countries in the research, including the US, Australia, and Chile, introduced the right of libraries or archives to reproduce and communicate works by libraries or archives for other libraries or archives.¹⁰⁰⁶ Vietnam should provide a provision that recognises interlibrary loan in copyright law. Doing so will make this act legitimate and facilitate its development.

Additionally, Vietnamese limitations and exceptions exclude libraries from the right of dissemination of copies of works in digital forms; it might impede the development of distance/digital libraries. Thanks to digital technologies, people can digitalise copyrighted works into digital forms so that they can be enjoyed online and transmitted through the internet. This has resulted in the dramatic growth of distance/digital libraries around the world in the past two decades.¹⁰⁰⁷ Libraries nowadays can serve patrons both from inside their premises and from a distance by sending digital copies to patrons. Unfortunately, library staffs are confronting with the challenge of addressing copyright issues related to distributing work in digital forms due to Vietnamese copyright law treating this act as copyright infringement. Therefore, libraries' distance services via digital forms have been unable to service target groups that suffer disadvantages of location or ability. Hence, Vietnam should allow libraries to communicate with users or other libraries in digital forms, in order to enlarge their service to different target groups in society.

Next, Vietnamese copyright law should extend the compulsory licencing scheme to libraries so that libraries are more active in serving the public and the rights of copyright owners are guaranteed by compulsory royalties. The free reproduction and communication of the works for users can be justified where libraries or archives use a reasonable portion of copyright works for research or study, subject to the requests of individual students or researchers. In this case, libraries or archives are obtaining the work on the behalf of users for the purpose of research or study, and such uses are deemed to be fair and not cause unreasonable prejudice to the interests of the copyright owners.¹⁰⁰⁸ However, the reproduction and communication of the whole or more than a reasonable portions of works for users

WIPO, 'Report on the Questionnaire on Limitations and Exceptions' Question 65 (10/06/2010) SCCR/2/7, 35 <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_7.pdf>.

¹⁰⁰⁶ Crews, above note 401 at 7.

¹⁰⁰⁷ Oded Novand Chen Ye, 'Users' Personality and Perceived Ease of use of Digital Libraries: The Case for Resistance to Change' (2008) 59 (5) *Journal of American Society for Information Science and Technology* 845.

¹⁰⁰⁸ I justified this argument in Section 6.6.1.

possible cause harm for the copyright owner, because users would otherwise be required to seek a license from the copyright owner to make the reproduction.¹⁰⁰⁹ Sam Ricketson asserted that a free use of the making of reproductions of the whole or more than a reasonable portion of copyright works for the purposes of individual users in the requesting library may be well be a disproportionate prejudice in the absence of a requirement to pay remuneration.¹⁰¹⁰ Similarly, in term of interlibrary lending, the making of the reproduction of work to supply to other libraries or archives is unreasonable prejudice to the economic interest of authors, in the sense of being disproportionate¹⁰¹¹ as required by the third step of the *Berne Convention* to assess the balance between copyright owners and users. Even in the case of reproduction and communication of works for preservation, it is possible that the copyright owners still suffers from loss.

Therefore, it is suggested that a requirement to pay remuneration may help to balance interests of both sides.¹⁰¹² This means that libraries must pay remuneration to the copyright owners, either by voluntary licensing or compulsory licensing schemes. Voluntary licences for libraries are possible but not appreciated because it might be difficult for libraries to negotiate with copyright owners to obtain licences. In many cases, according to Jane Ginsburg, transaction costs may be subdued by voluntary collective licensing.¹⁰¹³ Libraries in Vietnam are in poor conditions and tight budgets allocated from the government do not cover voluntary licensing fees which are ‘very often higher than the royalties reasonably payable in respect of the reproduction of the work’.¹⁰¹⁴ It is a good idea to apply the compulsory licencing scheme for libraries, so that they are able to access copyright works without permission, but reasonable payment must be made by the government to support this. It is necessary to repeat the words of Ginsburg: that ‘the real purpose of a compulsory license is to reduce the extent to which copyright ownership of the work conveys monopoly

¹⁰⁰⁹ Ricketson, above note 976 at 110.

¹⁰¹⁰ Ricketson, above note 976 at 120-121.

¹⁰¹¹ Ricketson, above note 976 at 120.

¹⁰¹² Ricketson, above note 976 at 40. Reports 1967 the discussion of Main Committee I, quoted at page 209 of this thesis

¹⁰¹³ Jane Ginsburg, ‘Creation and Commercial Value: Copyright Protection of Works for Information’ (1990) 90 *Columbia Law Review* 1865, 1926.

¹⁰¹⁴ Australian Copyright Law Committee, *Report on Reprographic Reproduction* (1976) the Franki review.

power, so that the copyright owner must make the work available to all who wish to access and exploit it'.¹⁰¹⁵

Last, Vietnamese limitations and exceptions do not extend privileges to other archives such as the State Record Management and Archives Department of Vietnam, Archives Departments in cities or provinces of Vietnam, and museums, galleries, or educational institutions that also have the role of collection, preservation and dissemination, and archiving documents including books, legal documents, maps, research theses, historical documents, artistic works, and unpublished works and so on.¹⁰¹⁶ This overlaps with provisions of the *Law on Archives*.¹⁰¹⁷ It is worth noting that the legislation of 20 member states in WIPO's survey includes limitations and exceptions permitting certain other institutions to engage in such acts. Such institutions may encompass museums, galleries, schools, universities, other non-for-profit school-related and educational establishments, research institutions, and even national cinematographic archives (such as in Greece).¹⁰¹⁸ The US,¹⁰¹⁹ Australia,¹⁰²⁰ and Chile¹⁰²¹ provide privileges for both libraries and archives. Therefore, Vietnam should extend the subject of limitations and exceptions to the archiving institutions mentioned above.

6.6.3 Limitations and exceptions for persons with disabilities

Visually impaired people comprise a large proportion of the global population. According to the World Health Organization (WHO), more than 161 million people worldwide are visually impaired. This includes 37 million persons who are considered blind and 124 million persons with 'low vision'. The WHO also recorded that more than 90% of visually impaired persons live in developing countries. In addition to those who are visually impaired are large numbers of persons who have other disabilities related to reading, including persons with inadequate access to reading aids, persons who cannot turn the pages of books, persons who cannot visit

¹⁰¹⁵ Ginsburg, above note 1013 at 1926.

¹⁰¹⁶ The *Law on Archives* enacted 3 January 2011, available in Vietnamese language at <<http://luathoc.cafeluat.com/showthread.php/122380-Luat-luu-tru-nam-2011-so-01-2011-QH13>>.

¹⁰¹⁷ The *Law on Archives 2011*, art 4.

¹⁰¹⁸ WIPO, 'Report on the Questionnaire on Limitations and Exceptions' Question 66 (10/06/2010) SCCR/2/7, 35 <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_7.pdf>.

¹⁰¹⁹ See s 108 of US *Copyright Act 1976*.

¹⁰²⁰ See ss 49, 50, 112AA and 200AB of the *Copyright Act 1968 (Cth)* of Australia.

¹⁰²¹ See arts 71 I, J, K, L and M of the *Chilean Copyright Act 2010*.

libraries, and persons suffering from dyslexia and other learning disabilities.¹⁰²² In Vietnam, the Ministry of Labour Invalids and Social Affairs recorded that approximately 5.1 million (7% of the population) are visually disabled people.¹⁰²³

In promoting human development, it is important that people with disabilities have equity of access in order to fully participate in economic, social, and political life. People with disabilities have ‘the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others’,¹⁰²⁴ as well as to ‘enjoy access to cultural materials in accessible formats’.¹⁰²⁵

In order to ensure access equity, copyright law must not constitute an unreasonable or discriminatory barrier to access to cultural materials by persons with disabilities. This means that there need to be provisions of limitations and exceptions that provide for people with disabilities. Similar to almost all countries in the world, Vietnamese copyright limitations and exceptions allow users to transcript cultural work into Braille or other languages for the blind without consent or payment to the copyright owner.¹⁰²⁶ This shows great progress in comparison with the *Civil Code 1995*¹⁰²⁷ and many other developing countries.¹⁰²⁸

¹⁰²² Knowledge Ecology International (KEI), ‘Comments of Knowledge Ecology International on the Green Paper: Copyright in the Knowledge Economy’, Brussels, COM(2008) 466/3 <<http://www.keionline.org/content/view/215/1>>.

¹⁰²³ See more at:

http://www.gslhcm.org.vn/contents/hoat_dong_khiem_thi/tai_lieu/dv_tv_cho_nguoi_khiem_thi/cam_nang_thuc_hanh_tot_nhat/contents/5/5.8

¹⁰²⁴ The *Convention of the Rights of Persons with Disabilities* (CRPD), 13 December 2006, ATS 12 (entered into force on 3 May 2008), art 21.

¹⁰²⁵ CRPD, art 30(1).

¹⁰²⁶ Article 25(1) (i) of the *Law on IP 2005*.

¹⁰²⁷ The limitations and exceptions for the blind allow the transcription of copyrighted works into Braille, but the current copyright law extends the limitations and exceptions to other possible languages for the blind, such as the refreshable Braille display (RBD), audio recordings or the DAISY format. See more at art 761(k) of the *Civil Code 1995*; Knowledge Ecology International (KEI), ‘Comments of Knowledge Ecology International on the Green Paper: Copyright in the Knowledge’ see the Proposal by Brazil, Ecuador and Paraguay, Relating to limitations and exceptions: Treaty Proposed by the World Blind Union (WBU)

<http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=122732>;

WIPO, SCCR Commits to Improving Access by Visually Impaired to Copyright – Protected Works <http://www.wipo.int/pressroom/en/articles/2009/article_0061.html>; Knowledge Ecology International, ‘KEI has filed comments on the EC’s Green Paper on Copyright in the Knowledge Economy’, Brussels, COM (2008) 466/3 <<http://www.keionline.org/content/view/215/1>>.

¹⁰²⁸ A report on the Questionnaire on Limitations and Exceptions noted that 21 out of 39 countries do not include limitations and exceptions for visually impaired persons. See more at WIPO, Standing Committee on Copyright and Related Rights, ‘Report on the Questionnaire on Limitations and Exceptions’ Question 67 (10/6/2010) SCCR/2/7, 35 <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_7.pdf>.

However, the limitations and exceptions for the benefits of disabled persons are restricted to the blind, rather than other disabled persons. Although a large number of persons are visually impaired, there are some other disabilities related to reading; namely, persons with inadequate access to reading aids, persons who cannot turn the pages of books, persons who cannot visit libraries, and persons suffering from dyslexia and other learning disabilities.¹⁰²⁹ Such persons also have high demand for access to knowledge via accessible formats such as the DAISY format, Braille, audio recordings, and refreshable Braille display (RBD). These people are excluded from the application of limitations and exceptions. Meanwhile, the other disabled, such as deaf persons, are not included in the limitations and exceptions. The US¹⁰³⁰ and Chile's¹⁰³¹ limitations and exceptions provide privileges for both the blind and other persons with disabilities.

In addition, there is a limitation and exception provision for importation for personal purposes that the blind can rely on, but only one copy is allowed. Unfortunately, the majority of the blind in Vietnam are living under the subsidy of the government and other charitable organisations. They are rarely able to afford to import copyrighted works for themselves. There is also the fact that in spite of having a lot of local book publishers, none of them have provided books for the blind.¹⁰³² The reason is that the production of such books is costly, while the customers of these products are few and have modest budgets. Worldwide, it is estimated that 5% of published books are available for visually impaired persons. This figure is less in developing countries due to the existing restrictions in global copyright norms regarding the import and export of works created without the authorisation of copyright owners.¹⁰³³ The statistics show that books for the blind in Vietnam have met around 60% of the demand and most of them are textbooks for compulsory education, not monograph books or entertainment works.¹⁰³⁴ Importation is a good idea in this circumstance. It is possible to resolve the problem if companies, organisations, the blind schools, or the government are allowed to import such books under the privileges of limitations and exceptions. However, they are not entitled to

¹⁰²⁹ Knowledge Ecology International (KEI), above note 1022.

¹⁰³⁰ Section 121 of the US *Copyright Act*.

¹⁰³¹ Section 71 of the 2010 *Chilean IP Law*.

¹⁰³² PDW Vietnam, 'The shortage of books for the blind' (18/10/2011) <<http://pwd.vn/thieu-sach-cho-nguoi-khiem-thi.html>>.

¹⁰³³ Knowledge Ecology International (KEI), above note 1022.

¹⁰³⁴ PDW Vietnam, above note 1032.

do so under current law. Therefore, the law reform should add a provision to allow organisations that assist people with disabilities to import works for disabled people.

Extending privileges for disabled people does cause loss of revenue for the copyright owner, because the copyright could otherwise authorise their works with licensing fees. However, this exception is justified by the social benefit as ‘increased access for disabled persons allows them to participate more fully in the cultural life of their society and become more productive citizens’.¹⁰³⁵ Increasingly, disabled people suffer disadvantages in participating in society, so they should be granted access to materials to encourage their involvement in economic, political and social life. Supporting access to copyright works for disabled people can cause some harm to the copyright owners from the loss of licensing revenue, but the harm suffered is justified by fulfilling social and cultural policy goals.¹⁰³⁶ Access helps to educate and improve the skills for disabled people so they are able to participate in the community as well as be self-sufficient. These skills might reduce the government’s burden in subsidising people with disabilities. Therefore, sacrificing the interest of the copyright owner to for the benefit of society is necessary. It will improve education and participation and encourage equality in society. Coming back to the third step of the three-step test of the *Berne Convention*, which assesses the balance between the interests of copyright owners and users, the prejudice to the owners by the usage proposed for disabled persons may be substantial or material, but it is not ‘unreasonable prejudice’ in sense of being disproportionate, because it is justified by the social benefits.¹⁰³⁷

Furthermore, Vietnam has not ratified the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled* (so-called *Marrakesh Treaty*),¹⁰³⁸ so it does not take advantage of global knowledge-sharing for the blind. It is said by the World Blind Union that ‘this was the first IP treaty benefiting public interest rather than the

¹⁰³⁵ Pamela Samuelson, *Justifications for Copyright Limitations and Exceptions* at p17 <https://www.law.berkeley.edu/files/Justifications_for_Copyright_Limitations_and_Exceptions_-_Pamuela_Samuelson.pdf>.

¹⁰³⁶ Samuelson, *Ibid* p.17.

¹⁰³⁷ Sam Ricketson indicated that the interpretation to be adopted in the third step is that ‘unreasonable prejudice’ may be voided by the imposition of conditions on the usage’. See Ricketson, above note 976 at 41.

¹⁰³⁸ WIPO, *Marrakesh Treaty*, Preamble.

interest of rights holders'.¹⁰³⁹ The *Marrakesh Treaty* allows accessible copies of books to be shared across national borders. It also allows the blind to access books directly over the internet, dramatically decreasing the administration cost of providing access to people in developing countries. By doing so, it increases the ability of people in developing countries to access global knowledge resources.¹⁰⁴⁰ Digital technologies help to digitalise the world's books into a form called 'book famine' that is accessible to the blind. By accession to the Treaty, Vietnam can bring massive information and knowledge to the blind and help them fully participate in the society. 'Signing costs nothing, but is the first step in providing massive benefits to people with print disabilities'.¹⁰⁴¹ Therefore, it would be beneficial for Vietnam, as a developing country where many people are print-disabled and a tremendous number of books accessible for the blind are imported from overseas, to sign this Treaty. However, Vietnam has not yet signed the Treaty.¹⁰⁴² If Vietnam does not sign the Treaty, it will lose the opportunity to take advantage of the global knowledge-sharing network. Moreover, the Treaty requires the ratification or accession of at least 20 nations to enter into force.¹⁰⁴³ The accession of Vietnam may contribute to a great movement for the Treaty.

6.7 CONCLUDING REMARKS

The chapter illustrated that current Vietnam copyright limitations and exceptions are more restrictive than ever before. They lack numerous important limitations and exceptions that facilitate innovation and development. Moreover, the fair dealing approach of the current copyright law cannot adapt to rapid changes in the digital economy. The scope of substantial copyright limitations and exceptions are limited. Therefore, it is necessary for Vietnam to pursue the policy of extending the scope of copyright limitations and exceptions in order to accommodate the high demand for access and the public interest.

¹⁰³⁹ World Blind Union (WBU), 'WBU Statement on Marrakesh Treaty' (27 June 2013) <<http://www.worldblindunion.org/English/news/Pages/WBU-Statement-on-Marrakesh-Treaty.aspx>> (retrieved 20 October 2014).

¹⁰⁴⁰ Nicolas Suzor and Suzannah Wood, 'The Marrakesh Treaty could bring the world's books to the blind' (14 June 2014) *The Conversation* <<https://theconversation.com/the-marrakesh-treaty-could-bring-the-worlds-books-to-the-blind-27101>> (retrieved 20 October 2014).

¹⁰⁴¹ Suzor and Wood, *Ibid.*

¹⁰⁴² See more at WIPO, *Contracting parties of Marrakesh Treaty* <<http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/marrakesh.pdf>>.

¹⁰⁴³ *Marrakesh Treaty*, art 18 (not yet entered into force) <http://www.wipo.int/treaties/en/text.jsp?file_id=301016>.

The chapter then suggested recommendations for limitations and exceptions in Vietnam. First, Vietnam should remove the three-step test from legislation, as the insertion of the test into law creates a double test for limitations and exceptions. Second, and most importantly, Vietnam should adopt fair use in its copyright law, as it is flexible, adaptable and certain and can address access issues emerging in Vietnam in the digital age. The current fair dealing approach is too scant to adapt to rapid changes in digital technologies and social life. Vietnamese courts are able to extend the scope of limitations and exceptions for private use, parody or satire, and reverse engineering of computer programs under the fair use doctrine. Fair use will work well in Vietnam, because precedent has been recognised. Furthermore, judges' IP knowledge has been increasing. However, some problems of the fair use's adoption are recognised, such as the source of case law and the conflicts of fair use with other legal fields. Third, Vietnamese copyright law should expand the scope of limitations and exceptions for educational purposes, because current limitations and exceptions for educational uses are limited in comparison to conditions and needs: they do not embrace self-study or distance learning circumstances. New limitations and exceptions for those circumstances must be added into legislation. The one-copy reproduction rule of educational materials for teaching creates difficulties for teachers in delivering educational materials to students, so it must be removed from law. In addition, the high cost of importation of educational materials caused by the impractical implementation of the *Berne* Appendix prevents the nation from achieving access to advanced knowledge from industrial countries. Moreover, Vietnamese teachers and students have elected to use illegal photocopies to gain access to educational materials, rather than buying them or negotiating licences from copyright owners, as this is time-consuming and expensive. Hence, Vietnam should introduce compulsory licences to resolve this issue. Next, Vietnamese minority ethnic groups are confronted with shortages of works translated into their own languages for educational purposes due to the absence of limitations and exceptions. Therefore, it is a good idea to add an exception for the translation and distribution into minority ethnic group languages. At the international level, Vietnam should actively engage in group discussions about issues that relate to benefits of developing countries, especially putting pressure on WIPO to review compulsory licensing schemes for developing countries towards more practical levels, so that Vietnam can receive less expensive advanced knowledge from industrial countries. Fourth, the

scope of limitations and exceptions for libraries needs to be broadened, because current limitations and exceptions provide libraries with limited privileges. The restriction of one copy of a reproduction impedes librarians in preserving cultural works. The prohibition on reproducing and disseminating copies to the public discourages librarians from providing service for the high knowledge demand of patrons. The prohibition of digitalising and distributing works to the public prevents libraries from improving their service through interlibrary lending and distance/digital libraries. Moreover, the current privileges provide for libraries only, not other archives, while many archiving organisations are involved in preservation activities. Therefore, it is suggested that the legislation remove the one-copy rule for preservation or replacement, and allow libraries to reproduce and disseminate copies to users and other libraries to digitalise works and communicate to users and other libraries in digital forms, and extend the privileges to other public archiving organisations. Last but not least, limitations and exceptions for people with disabilities have to be extended to ensure equal access across society. Current limitations and exceptions are only afforded to the blind, not other types of disabilities, such as visually impaired or deaf people. Such a restrictive scope constrains innovation and development; thus, it calls for reform by expanding the privilege to people with other disabilities. Additionally, Vietnam should allow organisations that assist people with disabilities to import works for disabled people. Furthermore, Vietnam should join the *Marrakesh Treaty* for the blind to take advantage of the international knowledge-sharing network.

Chapter 7: Conclusion and Future Work

The crucial issue for developing countries [Vietnam] is getting the right balance between protecting copyright and ensuring adequate access to knowledge and knowledge-based products. It is the cost of access and the interpretation of ‘fair use’ or ‘fair dealing’ exemptions that are particularly critical for developing countries [Vietnam], made more so by the extension of copyright to software and to digital material. These issues need to be addressed to ensure developing countries [Vietnam] have access to important knowledge-based products as they seek to bring education to all, facilitate research, improve competitiveness, protect their cultural expression, and reduce property.

Commission on IPRs¹⁰⁴⁴

7.1 SYNTHESIS OF THE THESIS

This thesis set out to argue how to create pragmatic limitations and exceptions to copyright to encourage innovation and development in Vietnam in the digital age. This main argument has been addressed through research questions and the construction of the argument proceeded in four stages. The first stage (Chapter Two) commenced with the recognition of the research gap and that Vietnamese copyright law is imbalanced and inappropriate for the conditions and needs of the country. This impacts on innovation and development. However, there has been nothing done in literature to solve this problem. The thesis then argued that innovation and development is good for people, and should be encouraged. The encouragement of innovation and development requires the facilitation of knowledge access, because knowledge is a unique resource of human welfare. The argument then developed the notion that knowledge access is restricted by copyright protection which impacts on creativity. Copyright protection has been recognised globally since the eighteenth century. This thesis asserts that stronger copyright protection over time might reduce innovation and development, and suggests that copyright laws should be balanced between the rights of owners and users. This balance is even more important for fostering innovation and development in Vietnam as a developing country, because this country requires broad access to advance growth and to improve human quality of life.

The second stage (Chapter Four) demonstrated the theory of the role of copyright limitations and exceptions in promoting innovation and development. This chapter highlighted that copyright limitations and exceptions create space for greater production, as

¹⁰⁴⁴ Commission on IPRs, ‘Integrating IPRs and Developing Policy’ (Report, September 2012) 96
<http://www.iprcommission.org/papers/pdfs/final_report/ciprfullfinal.pdf> (retrieved 16 January 2014).

well as providing knowledge access for the public to improve human capabilities. The third stage of the thesis (Chapter Five) examined the international law that restricts Vietnam from introducing limitations and exceptions: the three-step test and the related provisions of the *Berne* and beyond. It was shown that international law provides flexibility for nations to craft their own limitations and exceptions; therefore, Vietnam would be able to compose flexible limitations and exceptions like those in the US's fair-use style. The final stage (Chapter Six) attempted to analyse the shortcomings of current Vietnamese limitations and exceptions that constrain knowledge access. This identified that the fair dealing approach is likely to be inadequate to address the high access demand, and that current limitations and exceptions are too narrow. The conclusion reached was that Vietnam should amend its laws toward broadening the scope of limitations and exceptions, adopting fair use, and expanding access for education, libraries or archives, and for people with disabilities.

This final chapter summarises the main arguments of the thesis. It then highlights the findings as a significant contribution and concludes with a set of unanswered questions where future work will be required.

7.2 SUMMARY OF MAIN ARGUMENTS OF THE THESIS

This section briefly summaries the arguments that have been discussed at length from Chapter Two to Chapter Six of the thesis. Research questions have been answered throughout the arguments.

7.2.1 The context of Vietnam and its copyright

Chapter Two argued that Vietnam has a high demand of access to knowledge due to rapid economic growth. The impact of Confucianism ideologies in addition to the influence of French civilisation has created a tremendous desire for achieving knowledge in the Vietnamese people. To promote innovation and development, Vietnam needs scientific knowledge that is currently mostly accumulated in written forms protected by copyright law. Therefore, Vietnam needs considerable access to copyright works. Moreover, its politics, legal conditions, and Confucianism ideals favour providing priority access to the public. A flexible copyright law system that provides broad access for the public is expected to align with all of these aspects. However, the Vietnamese copyright law system does not align with this argument. This thesis argues that Vietnam's copyright is currently favoured towards the copyright owner, while paying little attention to limitations and exceptions to copyright, making the copyright system imbalanced. Consequently, Vietnamese citizens face challenges

in accessing copyright material for greater production and building capabilities. It is necessary for the country to re-balance its copyright law by expanding the scope of copyright limitations and exceptions.

7.2.2 The relationship between access to knowledge, innovation, development, and copyright.

Chapter Two argues that knowledge access is the determinant of innovation and development. Access to knowledge is desirable by all citizens for creative activities, as well as enhancing human capabilities, because knowledge is a unique resource of human welfare. Knowledge begets innovation, as people need access to knowledge to learn and create. People also need access to obtain knowledge in economics, law, geography, relationships, personalities, health, literacy, art, history, and politics in order to empower themselves to improve their freedom, participation, education, emotions, senses, and other choices. Therefore, promoting innovation and development means the facilitation of knowledge access.

However, people are often not willing to share their knowledge, as they are afraid that they will receive nothing if it is distributed, and it is impossible to stop other people from using it. The nature of knowledge as a public good is non-excludable, so this fear is understandable. Copyright protection contributes an external force to encourage authors or innovators to distribute their knowledge by granting them exclusive rights within a limited time to control or monopolise their work in order to benefit from it.

Copyright has been recognised as playing an important role in determining whether knowledge is shared widely for the benefit of all, or controlled and monopolised for the benefit of few. It provides incentive for authors to invest in the production of works through the temporary monopoly of authors over their production. Nevertheless, the monopoly prevents the public's access, as the copyright owner erects walls such as licences, royalties, technological protection measures, and civil and criminal liabilities. If merely used as a protection tool, copyright impedes the knowledge flow in the community. Copyright is not only a protective means for the author; it is actually a social contract between authors and users. It provides limitations and exceptions to ensure the public's access and facilitates the flow of knowledge within society at the same time. Therefore, how copyright deals with two sides of the contract decides the availability of knowledge. A balanced copyright system, as emphasised in this thesis, is the best way to support access to knowledge and the incentive of production.

7.2.3 Unbalance copyright harms innovation and development in developing countries

The history of copyright law shows that the copyright system is currently unbalanced and hurts innovation and development. Copyright protection has increased globally – both vertically and horizontally – while limitations and exceptions to copyright, the other side of the social contract, are limited. A rapid global expansion and upward harmonisation in the last two decades have made copyright protection overly strict. In contrast, the global community has been blind to the importance of limitations and exceptions, as little movement has been witnessed from the international community.

Too much protection is hurting innovation and development in developing countries. Pushed by developed countries in the name of harmonising global trade, copyright protection is overly strong, while limitations and exceptions are forgotten by law-makers in developing countries. This is problematic, as such nations have a high demand for knowledge access to increase development. Developing countries are net importers of cultural works, but are living under low levels of social and economic development. They desire knowledge, but have tight financial budgets. Overly strong copyright protection increases knowledge prices, because copyright administration and licensing fees evolve. Innovation and development are thus hindered. While change at the international level is not feasible, developing countries should consider constructing proper limitations and exceptions to re-balance the copyright system. Doing so facilitates knowledge access and promotes innovation and development.

7.2.4 Limitations and exceptions can facilitate innovation and development

The research questions regarding the role of limitations and exceptions in facilitating innovation and development were answered in Chapter Three. Through the literature review, the range of important impacts of limitations and exceptions in connection to innovation and development were determined. Limitations and exceptions create space for the public to access cultural expression for greater production. At the same time, they provide ‘start-up capital’ for innovators, encourage the entrepreneur to invest in risky innovations, and create new markets for technology companies, as well as repairing market failure for the purpose of market efficiency. This in turn spurs creativity. At the same time, limitations and exceptions enhance human development by putting in place strong supports for freedom of expression, which is the core element required to build and promote a democratic society. They open gateways for the public to access knowledge for learning, research, and communication, create more opportunities for the public to enjoy cultural products, and help humans to preserve, enrich, and share cultural knowledge.

Among various limitations and exceptions, this thesis mainly focused on the substantial limitations and exceptions that could have a significant impact on innovation and development. Therefore, this thesis limits its scope within limitations and exceptions to fair use or fair dealing (which contain private use, quotation, parody or satire, and reverse engineering of computer programs) for libraries or archives, for education, and disabled people, though the author acknowledges that all limitations and exceptions can improve innovation and development to some extent.

7.2.5 International law on limitations and exceptions

International rules on limitations and exceptions were first stipulated by the *Berne Convention* and then repeated by the *TRIPS Agreement* and many other conventions. Chapter Five argued that the international law leaves much freedom for nations to tailor limitations and exceptions in their domestic laws. The most important provision of the international copyright law is the three-step test. The three-step test was regulated to limit the scope of limitations and exceptions in domestic law. However, the test is extremely abstract and no formal interpretation is provided, which has led to diverse interpretation. It is subject to the interpretations of the *WTO Panel* in the *Section 110 (5)* case; namely, a policy-based approach and a balanced approach. Regardless of the diversity of its interpretations, the norms of the test are general and flexible, because it was originally intended to be sufficiently vague to cover the gamut of national exceptions that already existed in domestic laws. Thus, the test leaves room for countries to adopt open-ended limitations and exceptions. The test offers countries much latitude in interpreting their own conformity. They determine their own limitations and exceptions in compliance with their own conditions and needs, as long as the limitations and exceptions are predictable. The flexibility of the test can be open-ended like the fair use style of the US, because the four factors of fair use are flexible, yet predictable.

Apart from the three-step test, the *Berne* mentions some specific limitations and exceptions – namely quotation, and limitations and exceptions for teaching and information purposes. *Berne* requires nations to regulate the right to quote as mandatory, and this implies that the minimum level of limitations and exceptions is quotation. Therefore, the freedom of nations in introducing limitations and exceptions is from quotation up to open-ended fair use. Apart from that, no specific requirement is set out, which leaves nations free to craft their own limitations and exceptions, as long as they comply with the three-step test.

The Appendix added into the *Berne Convention* was created for the benefit of developing countries by providing compulsory licences for translation and reproduction.

However, this thesis found that the Appendix has never been used in practice, due to the complicated, time-consuming, and expensive requirements needed to obtain these licences. The Appendix has done nothing to help developing countries expand their ability to access knowledge from the developed world.

7.2.6 Backward limitations and exceptions in Vietnam threaten innovation and development

By investigating its law and the reality, this thesis explored that Vietnam has been going in the wrong direction, as its limitations and exceptions keep various restrictions in place. The verbatim inclusion of the language of the *Berne* three-step test in its law, the same mistake made by Australia, makes the law unclear. Moreover, it creates a double test for limitations and exceptions, as in Brazil. Additionally, the adoption of the rigid fair dealing approach has constrained the country in keeping up with the rapid changes of digital technologies and social life, as this approach is too scant to adapt to new social circumstances. The exhaustive list of limitations and exceptions has been not able to extend the scope of limitations and exceptions for private use, parody or satire, and reverse engineering of computer programs. Furthermore, substantial limitations and exceptions contain tremendous shortcomings. Limitations and exceptions for educational uses do not embrace self-study or distance learning circumstances. The one-copy reproduction rule for educational materials creates difficulties for teachers in the delivery of educational materials to students. The high cost of importation of educational materials caused by the impractical implementation of *Berne* Appendix has also constrained the nation from achieving advanced knowledge from industrial countries. Vietnamese teachers and students have therefore elected to use illegal photocopies to gain full access to educational materials, rather than buying them or negotiating licences from copyright owners, as this is time-consuming and expensive. Next, Vietnam minority ethnic groups are confronted by a shortage of works translated into their own languages for educational purposes, due to the absence of limitations and exceptions. Moreover, libraries are struggling with copyright issues, as limitations and exceptions provide them with limited privileges. One copy or reproduction again impedes librarians from preserving cultural works. The prohibition of reproducing and disseminating copies to the public discourages librarians from providing service for the high knowledge demand of patrons. The prohibition on digitalising and distributing works to the public prevents libraries from improving their service through interlibrary lending and distance/digital libraries. Moreover, the current privileges provide for libraries only, not other

archives, while many archiving organisations are involved in preservation activities. Limitations and exceptions for people with disabilities only reach the blind, not other types of disabilities, such as the visually impaired or deaf. Vietnam has not ratified the *Marrakesh Treaty for the Blind* yet, so it cannot take advantage of the limitations and exceptions regulated in this Treaty. Such a restrictive scope of Vietnam's limitations and exceptions certainly constrains innovation and human development; thus, it calls for reform by expanding the scope of limitations and exceptions.

7.2.7. Appropriate limitations and exceptions enables more access to knowledge for innovation and development

It is high time for Vietnam to implement appropriate limitations and exceptions to its copyright law in order to help the country facilitate innovation and development. Vietnam should pursue broad and flexible limitations and exceptions, because it enables the country to acquire more knowledge for greater production and human progress. As a developing country, there is a significant knowledge gap between Vietnam and the developed world, so accessing knowledge to develop is vital. Also, due to the shortage of knowledge to improve skills for its workforce, Vietnam needs a broad scope of limitations and exceptions to provide more rights for students, teachers, libraries and educational institutions to access to copyright works. Furthermore, the culture and history of the country would support the implementation of broad limitations and exceptions into law to obtain and share knowledge.

The most important suggestion of this thesis is that Vietnam should introduce fair use into its copyright law. This approach is flexible, adaptable and certain. It will bring more opportunities for the public to actively access copyright works. Introducing fair use in its legislation helps the Vietnamese people more chances to improve freedom of expression, and to access education and resources for greater productivity. Additionally, adopting fair use will not heavily impact on the interests of copyright owners, because fair use complies with the three-step test of the *Berne Convention*. Vietnam will confront some problems when implementing fair use, such as the application of the doctrine into the civil law system, the shortage of case law, and the judges' IP knowledge. However, these problems outweigh the benefits as demand for knowledge access and the need for innovation and development is urgent. Therefore, Vietnam should provide fair use into legislation but should carefully implement it so it can work effectively.

Next, Vietnam should expand the scope of limitations and exceptions to copyright for education, libraries and people with disabilities. The fair use approach does not cover

everything; countries have to construct other limitations and exceptions around fair use to support the legitimate uses of copyright works. In the future, to obtain economic development, Vietnam needs to focus on equipping its workforces with skill-incentive, non-manual jobs. In order to do that, Vietnam needs to train its workers using modern teaching methods, curriculum and contents. Providing more support for the educational sector through copyright limitations and exceptions will help the country solve this problem. Furthermore, making libraries more attractive is important to improve education, enjoyment, and participation, which are key factors of human development. Therefore, expanding the limitations and exceptions for libraries will allow for increased access rights to copyright works and enable better services to be provided to the public. Last but not least, expanding copyright limitations and exceptions for disabled people – not only the blind but also to other disabled people – is necessary to ensure equal opportunity in access to knowledge for the population. Such access helps disabled people to be more educated and skilled.

Extending the scope of copyright limitations and exceptions in Vietnam will not harm the interest of the copyright owner. The extension must be designed based on the three-step test. Fair use will be introduced in a way that allows the courts and users to evaluate the interest of the copyright owners to ensure that a particular use ‘does not unreasonably prejudice the legitimate interests of the author’.¹⁰⁴⁵ The extension of limitations and exceptions for education and libraries benefits the interests of copyright owners when it applies compulsory licences for educational uses that create royalties for copyright owners.

Therefore, expanding the scope of limitations and exception is a good option. It benefits innovation and development and re-balances the copyright law system.

7.3 SUMMARY OF THE FINDINGS

This thesis found that Vietnam, like other developing countries, has a high demand for knowledge access, but is confronted with a shortage of financial and knowledge resources. Furthermore, knowledge is mostly accumulated in industrial nations. A proper policy to facilitate knowledge transfers from industrial nations to Vietnam and encourage sharing knowledge within the country could empower the competitive position of the country and increase quality of life for all citizens. The overly strong copyright protection forced by international standards cannot encourage knowledge access. Vietnam should move towards

¹⁰⁴⁵ The third step of the three-step test under art 9(2) of *Berne Convention*. See at Chapter Five of the thesis.

broad or flexible limitations and exceptions to facilitate knowledge access to improve education and health, and enrich the culture, politics, and enjoyment of its citizens.

In order to construct a broad scope of copyright limitations and exceptions, Vietnam should remove restrictions existing in current limitations and exceptions. In particular:

- Vietnam should remove the three-step test from legislation to ensure the laws are clear and flexible.
- Vietnam should adopt the fair use doctrine in its limitations and exceptions. Fair use can fix the issues emerging in the digital age. It is flexible, adaptable and certain; therefore, it can accommodate circumstances of time-shifting, format-shifting for private use, parody or satire, and reverse engineering currently missing in copyright law. Its flexibility will help the courts to react promptly to new circumstances. Fair use will work well in Vietnam because precedent has already been recognised as a source of law. Moreover, judges' IP knowledge has increased.
- More limitations and exceptions for educational uses must be inserted into copyright law: (1) limitations and exceptions for self-study and distance learning must be added into legislation; (2) the one-copy reproduction rule of educational materials for teaching must be removed from the law; (3) compulsory licences should be introduced so that teachers and students can use or reproduce entire textbooks, articles, course-packs, and other educational materials for a small payment, instead of using illegal photocopying shops; (4) Vietnam should add an exception for translation and distribution into minority ethnic group languages to ensure equality between ethnic groups in acquiring knowledge, and to improve the living conditions of minority ethnic groups.
- Copyright exceptions for libraries and archives should be updated to better enable preservation and other legitimate uses in accordance to keep pace with rapid technological change. Copyright law should: (1) remove the one-copy rule for preservation or replacement and enable to some extent reproduction of copies of copyright materials for preservation and security; (2) allow libraries to reproduce and disseminate single copies of small portions of all types of works, regardless of format, for legitimate purposes such as scholarship, research, study, or upon the request of users or other libraries, and digitalise works and communicate with users and other libraries in digital forms; (3) extend these privileges to other public archiving organisations, such as museums and public galleries; (4) search and preserve collections of publicly available online content based on the needs and interests of local

communities and make them available to users; (5) convert the format of works when the equipment for retrieving the work is obsolete and the copyright owner has not distributed the work in the newer format.

- Vietnam should expand privileges to all disabled people, not only the blind, as at present. Moreover, Vietnam should allow organisations that assist people with disabilities to import works for disabled people. Vietnam should also join the *Marrakesh Treaty* for the blind to be able to take advantage of the international knowledge-sharing network.

- At the international level, Vietnam should actively engage in group discussions relating to developing interests, especially putting pressure on WIPO to review compulsory licensing schemes for developing countries to make them more practical, so that Vietnam can purchase advanced knowledge from industrial countries at less expensive prices. In reality, access to books and learning material for education and research in developing countries, including Vietnam, remains a real problem due to the high cost of imported books and limited access to overseas internet-based resources. Likewise, libraries, which play a key role in supporting research and ensuring access to books, journals, and online material, are in a poor state. Most of them cannot afford to buy new books and gain access to online resources due to expensive royalty rates. The limited compulsory licensing schemes for developing countries have not been effective, as they do not support a reduction in the high cost of royalties, which is important in developing countries. Therefore, further reforms are needed to ensure that developing countries are able to enjoy greater freedom to fulfil their educational needs. Doing so will improve social and economic development.

- Vietnam should immediately join with Chile, Brunei, Malaysia, and other developing countries to vote for a broad scope of limitations and exceptions in the proposal of TPP. The negotiations of TPP are ongoing, so Vietnam should take action before it becomes too late. Leaks of TPP on copyright limitations and exceptions reveal that the US and other developed countries want to put more restrictive limitations and exceptions in place, so as a member of the agreement, Vietnam must say no.

7.4 FUTURE WORK

Copyright limitations and exceptions play an important role for developing countries such as Vietnam, as they are vital strategic and doctrinal means to facilitate innovation and development by providing citizens with the basic tools to engage in intellectual endeavours and to participate in the global knowledge economy. The task of constructing a proper set of

copyright limitations and exceptions for innovation and development in developing countries has received increasing attention from policy-makers, as well as the public. Much hard work has been undertaken to make sense of introducing a broad set of copyright limitations and exceptions for developing countries. This thesis has been successful in adding to copyright literature recommendations for constructing a broad set of copyright limitations and exceptions for Vietnam.

The most crucial challenge addressed by this thesis was to develop a new approach for limitations and exceptions in Vietnam, which is the fair use doctrine. This thesis has attempted to make the argument that fair use is the best option for Vietnam in the digital age. In order to successfully adopt fair use, much work remains to be done on the continued refinement of how the fair use provision should be stipulated in Vietnamese copyright law. Further analysis is needed to refine the ways to introduce the fair use doctrine so that it makes sense in Vietnamese languages. It needs to be abstract, but certain enough to be understood by the courts and ordinary people. Investigating the languages of the US fair use style needs to be associated with an understanding of Vietnam's culture and conditions, as verbatim repetition of the US fair use language will not bring success for Vietnam, as shown by the lesson of the three-step test in Vietnamese legislation. Moreover, adopting the fair use approach in Vietnam will lead to a change in the approach of limitations and exceptions from inflexible to flexible. More research should be undertaken to clarify which related legal provisions in Vietnamese law should be amended to comply with fair use.

The thesis has discussed the issues that can impact on the operation of limitations and exceptions in practice; namely, the use of licensing contracts overriding copyright limitations and exceptions, and the use of TPMs to exclude or restrict the use of copyright limitations and exceptions; however, such issues are not demonstrated in this study and are in need of further investigation.

In addition, Chapter Four of the thesis indicated that special limitations and exceptions for developing countries under the *Berne* Appendix have been of little benefit to developing countries; therefore, it is open to an ongoing process of critique and refinement as to how to amend compulsory licensing schemes to make them more practical for developing countries. If such schemes are impractical, what are the alternative solutions to solve the access problems in developing countries at the international level?

Ongoing research should be required for all copyright regulation at the international level, as the world has undergone profound changes in recent years, especially with the spread of the internet and digital technologies, while international copyright law has done little to keep up with these changes. It is worth repeating the words of the President of Russia, Dmitry Medvedev, who recently said:

Digital technologies and global information networks have made a real breakthrough in information accumulation and exchange. The old principles of intellectual property protection established in a completely different technological context do not work any longer in an emerging environment, and, therefore, new conceptual arrangements are required for international regulation of intellectual activities on the Internet.¹⁰⁴⁶

¹⁰⁴⁶Dmitry Medvedev, 'Dmitry Medvedev's message to the G20 leaders', President of Russia (3 November 2011) <<http://eng.kremlin.ru/news/3018>> (retrieved 31 October 2013).

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Appendix

Vietnam copyright limitations and exceptions under groups¹⁰⁴⁷

<i>Purposes/Intent</i>	<i>Provisions</i>	<i>Descriptions</i>
<i>Freedom of Expression or Creation</i>	Art. 25 (1)(b): Quotation for commentary or for illustration	<p>It is acceptable to make a reasonable quotation of works without alteration of their contents for commentary or for illustration in one's own works.</p> <p>The question of how much of a quotation is reasonable is determined by two factors: first, the recited parts aim merely to introduce, comment or clarify matter touched upon in his/her work, and second, the number and essence of parts recited from the work used for recitation are not prejudicial to the copyright to such work and suitable to the nature and characteristics of the type of work used for recitation.¹⁰⁴⁸</p>
	Art. 25 (1)(c): Quotation in articles, journals, broadcast programs	It is permitted to quote from a work without alteration of their contents for use in articles, periodic, journals, radio, television programs, and documentary films

¹⁰⁴⁷ This Appendix is summarised by the author based on the 2005 *Law on IP of Vietnam*.

¹⁰⁴⁸ Article 24(1) of the *Decree 100/2006/ND-CP*.

	<p>Art. 26 (1): Broadcasting copyright works or using published works for making broadcasting program</p> <p>(compulsory license)</p>	<p>The broadcasting organisations are able to broadcast copyright works without authorisation but paying royalties to the copyright owner for such uses. Also, entities are eligible to use published phonograms and video recordings to make broadcasts without the sanction of copyright owner as long as the payment of royalties is made.¹⁰⁴⁹ If such uses are supported by the sponsor, advertising or charged money in any form, the royalties are determined on the basis of the agreement between parties otherwise on the basis of the government's regulations or the judgment of the court. Conversely, such uses are not supported by any kind of sponsorship; the royalties</p>
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¹⁰⁴⁹ Article 33(1):

Cases of use of related rights in which permission is not required but payment of royalties or remunerations is required

1. Organizations and individuals that directly or indirectly use phonograms or video recordings already published for commercial purposes in making their broadcasts, which are sponsored, advertised or charged in whatever form, are not required to obtain permission but have to pay agreed royalties or remunerations to authors, copyright holders, performers or producers of phonograms or video recordings, or broadcasting organizations from the date of use. In case no agreement is reached, they shall comply with regulations of the Government or institute lawsuits at court under law.

The *Law on IP 2005* art 33(1).

Organizations and individuals that directly or indirectly use phonograms or video recordings already published for commercial purposes in making their broadcasts, which are not sponsored, advertised or charged in whatever form, are not required to obtain permission but have to pay agreed royalties or remunerations to authors, copyright holders, performers or producers of phonograms or video recordings, or broadcasting organizations from the date of use under regulations of the Government.

The *Decree 100/2006/ND-CP (21/9/2006)* detailing and guiding the implementation of a number of articles of the *Civil Code* and the *Intellectual Property Law* regarding copyright and related rights, art 35(1) interprets

‘the direct use of phonograms and video recordings’ for commercial purpose in making broadcasts means the transmission by broadcasting organizations of such phonograms or video recordings by wire or wireless means, including the transmission by satellites or in digital environment. The indirect use of phonograms and video recordings means the relay or retransmission of transmitted broadcasts, or putting of broadcasts in digital environment on air.’

		are calculated on the ground of the government's regulations. ¹⁰⁵⁰
<i>Private Use</i>	Art. 25(1)(a): Self-reproduction (uncompensated use)	Individuals are only allowed to reproduce one single copy of the work for purposes of either scientific research or teaching, but the use must be non-commercial.
	Art. 25 (1)(k): Importation for personal use (uncompensated use)	Individuals can import copies of others' works for personal use. The condition for such importation is no more than one copy of a work. ¹⁰⁵¹
<i>Person with disabilities</i>	Art. 25 (1)(i): Translation of the work into Braille or the like (uncompensated use)	It is not a copyright infringement to make a copyright work available to the blind in an accessible form such as transcription into Braille.
<i>Educational purposes</i>	Art. 25 (1)(a): Self-reproduction	Individuals are only allowed to reproduce one single copy of the work for purposes of either scientific research or teaching.

¹⁰⁵⁰ Regarding the government's regulations, there is a government document, *Decree 61/ND-CD 11/6/2002*, that stipulates the royalty regime of copyright and related rights. Payments of royalty must ensure the equality of interests between authors, copyright owners and users and comply with the social economic situation of the country. Moreover, the amount of royalty depends on which group the work belongs to. For example, works used in form of publications such as books, poems, cartoons, theatrical and cinematographic scripts are paid based on the formula:

$$\text{Royalty} = \% \text{ royalty rate} \times \text{retail price of publications} \times \text{Quantities of prints}$$

The payment of remuneration may be made directly to the copyright owner or, where a copyright collecting society has been declared as the entity responsible for administering the exercise of rights in a particular category of materials, arrangements for the payment of remuneration are made with the collecting society which then distributes moneys received to copyright owners. More particularly, through the contracts on transferring rights, the copyright and related right owners shall assign their individual rights to the collective management organization to represent them in managing and exploiting different rights. These organisations shall license the use of works and collect copyright fees to distribute the owners. Currently, there are four copyright and related rights collective management organisations: the Vietnam Centre for Protection of Music Copyright (VCPMC), the Recording Industry Association of Vietnam (RIAV), the Vietnam Literary Copyright Centre (VLCC) and Vietnam Reproduction Rights Organisation (VIETRRO).

¹⁰⁵¹ The interpretation of art 24(2) of *Decree 100/2006/ND-CP*.

	(uncompensated use)	Only one copy of the work is permitted.
	Art. 32(1)(b): Duplication of related rights' works for teaching purposes (uncompensated use)	Duplication of related rights' works for teaching purpose, except for performances, phonograms, video recordings, or broadcasts published for teaching.
	Art. 25(1)(d): Quotation (uncompensated use)	<p>Quotation of the work in schools for teaching purpose without misrepresenting the authors' views and non-commercial purpose is permitted without authorisation and payment.</p> <p>The term of "schools" comprises "all forms are established according to the State plans aiming at development of the cause of education".¹⁰⁵² A school, thus, could be State (public), people-funded or private. It could be a pre-school, compulsory school, college, or university as long as having functions of organising teaching, studies, and other educational activities according to educational objectives and program to ratify or issue diplomas, certificates within its authorities.¹⁰⁵³</p>
	Art. 25(1)(g): Directly recording	Audio-visual recording of

¹⁰⁵² The *Education Law 2005* (revised 2010), art 48(2).

¹⁰⁵³ The *Education Law 2005* (revised 2010), art 58.

	and reporting performance for educational purposes (uncompensated use)	performances for teaching purpose is allowable
<i>Libraries and Archives</i>	Art. 25 (1)(d): Copying a work in libraries (uncompensated use)	The libraries are eligible to reproduce partly or entirely copyrighted works for archiving or research, but no more than one copy can be made. However, libraries are not allowed to reproduce and disseminate copies of works to the public, including digital copies. ¹⁰⁵⁴
<i>Technological Purposes</i>	None	None
<i>Public interest or public use</i>	Art. 25 (1)(g): Directly recording and reporting performance for public information (uncompensated use)	It is not a copyright infringement to copy audio-visual record performances for the purpose of public information
	Art. 25 (1)(e): The use of copyright work in the free of charge mass cultural, propaganda activities (uncompensated use)	It is permitted to use dramatic works or other type of artistic performance without permission or remuneration, as long as the use occurs during a “mass cultural, or public politic campaign activity” and no payment is required by the organiser of such event.
	Art. 25 (1)(h): Photographing or televising public-displayed works	Everyone is eligible to take photographs or broadcast on television artistic works displayed

¹⁰⁵⁴ The interpretation of art 25(2) of Decree 100/2006/ND-CP.

	(uncompensated use)	in public as long as the purpose of the use is to introduce images of such works.
	Art. 33 (2): Using published phonograms and video recordings for commercial activities (compulsory license)	Any individual and organisations are allowed to use published phonograms and video recordings in their business without the consent of the author but they have to pay royalties. The use of phonograms or video recording in business activities means the direct or indirect use by organisations or individuals of published phonograms or video recordings in restaurants, hotels, shops, department stores, in establishments providing karaoke, post, telecommunications or digital environment services, in tourist, aviation, mass transit activities, and other business or commercial activities. ¹⁰⁵⁵ The amount of royalties is determined based on the parties' agreement. If parties are not able to reach any agreement, the government's regulations or the judgement of the court will be applicable.

¹⁰⁵⁵ The *Decree 100/2006/ND-CP* (21/9/2006) detailing and guiding the implementation of a number of articles of the *Civil Code* and the *Intellectual Property Law* in regard to copyright and related rights, art 35 (2).